Supreme Court, U.S.
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No. _____

In The Supreme Court Of The United States

BRENDA J. FORD, Petitioner,

v.

COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Respondent.

On Petition for Writ of Certiorari

to the

Supreme Court of the State of Hawai'i

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QUESTIONS
BRIEF
APPENDIX 1

REDISTRICTING (REAPPORTIONMENT) CASE QUESTIONS PRESENTED

1. Did the Hawai'i State Supreme Court ("HSSC"), and/or the Circuit Court of the Third Circuit ("Third Circuit Court") violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("no state shall ... deny to any person within its jurisdiction the equal protection of the laws") when both courts upheld the Hawai'i County Reapportionment Commission's ("RC") redistricting plan although that plan exceeded the 10% standard without justification?

2. Did the HSSC err when it allowed the RC's redistricting plan to stand because it was "only slightly over the acceptable 10% standard" (10.89%) when today's computer technology makes it practicable to keep the total deviation below 10%?

3. Did the HSSC and/or the Third Circuit Court err when each allowed the RC's plan to stand when that plan does not provide equal representation, dilutes the weight of the votes in Council Districts 1, 3, 4, 5, 6, 7, 8, 9, and enhances the votes of Council District 2 by incorrectly including 810 of 871 nonresidents in District 2?

4. Did the HSSC and/or the Third Circuit Court err in allowing the RC's plan to stand when: a) districts did not have equal resident populations because the total deviation exceeds the 10% standard b) districts were not as compact as practicable, c) communities of interest were fractured, and d) favoring persons and incumbent protection gerrymandering was allowed?

5. Did the HSSC and/or the RC err in allowing the RC's plan to stand when the RC ignored documented growth rates, and placed the most positive deviation percentage in areas of high growth and the most negative

deviation in the areas of low growth thereby increasingly exacerbating vote dilution for the next ten years?

6. In local redistricting cases, shall Federal laws and binding U.S. Supreme Court case precedents that have been extended to include municipal governments, along with mandated State and/or County redistricting criteria, be required to be incorporated into the RC's plan unless justification for not including precedents and criteria is provided by the RC?

7. Shall the RC be required to publicly and formally adopt, as close to the inception of the redistricting process as practicable, all redistricting policies and provide written documentation of those policies as part of the submission of its final redistricting plan?

8. Did the mere mention of a valid redistricting criterion by one Commissioner without a vote of the RC's other Commissioners constitute "consideration" and "adoption" of either that criteria or a rational state policy?

9. Did the HSSC err in imposing its own "rational state policy" of "inclusiveness and equal representation" on the RC's redistricting plan when the RC failed to provide a verbal explanation, or a formally adopted, written policy?

10. Did the HSSC err when it ruled that the RC evidenced an intent of a "rational state policy" of "inclusiveness and equal representation" based on a Commissioner's hearsay and incorrect information, the RC's use of the incorrect population base, and a total deviation in excess of 10% without justification?

11. Did the RC abuse its discretion by not explicitly addressing all of the statutory factors, particularly equal population, when it voted against even consideration of the

Appellant's plan which had a lower total deviation and addressed statutory factors?

12. Did the RC err when it voted to not consider an alternate plan that was presented in ample time that had a lower deviation, greater compactness, and addressed statutory factors?

13. Can the U.S. Supreme Court review issues in this case de novo, or review issues that were de novo to the HSSC, that were stipulated out of the Appellant's case in order to present an appeal to the HSSC in a timely manner?

PARTIES TO THE PROCEEDING

Plaintiffs-Appellants

Citizens for Equitable and Responsible Government, a Hawai'i nonprofit corporation;
Brenda J. Ford
Stanley A. Boren
Floyd H. Lundquist
Marlene E. Lundquist
Ronald C. Phillips

Plaintiffs-Appellees

Beverly Byouk
Sandra W. Scarr

Respondents

County of Hawai'i
Al Konishi, County Clerk, County of Hawai'i
Lloyd Van De Car, 2001 Chairman of the Reapportionment Commission, County of Hawai'i

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Other Authorities

Black's Law Dictionary
Abridged Seventh Edition
Bryan A, Garner, Editor-in Chief
2000

How To Draw Redistricting Plans That Will Stand Up In Court
Peter S. Wattson, Counsel to the Minnesota State Senate

In The Supreme Court Of The United States

This case raises important questions regarding the redistricting of the smallest governmental units and the criteria, standards, precedents, and laws that apply to these local governments.

OPINION OR JUDGMENT BELOW

Hawai'i State Supreme Court

Order Granting in Part and Denying in Part in Motion for Reconsideration filed on September 27, 2005. The Dissenting Opinion by Justice Paula A. Nakayama with whom Chief Justice Ronald T. Y. Moon joins was issued the same day. (Page A 1)

Order of Correction (Case No. 25614) was issued on July 28, 2005 to correct the civil number to read: Civil No. 02-1-0092. It was filed on July 29, 2005. (Page A 22)

Opinion of the Court (No. 25614) was filed on July 26, 2005. It is reported at 108 Haw. 317. The Concurring and Dissenting Opinion by Justice Paula A. Nakayama with whom Chief Justice Ronald T. Y. Moon joins was issued the same day. (Page A 24)

Circuit Court, Third Circuit Court

Final Judgment (Civil No. 02-1-0092 (Hilo) (Declaratory Judgment) was filed on January 24, 2003. (Page A 50)

Order Denying Plaintiffs' Motion for Partial Summary Judgment of the Complaint and Granting Partial Summary Judgment for Defendants (Civil No. 02-1-0092 (Hilo). Date of filing was July 19, 2002. (Page A 52)

STATEMENT OF JURISDICTION

The Hawai'i State Supreme Court ruled in its Final Judgment on September 22, 2005 to uphold an illegal redistricting plan. (Page A 1)

The Fourteenth Amendment of the Constitution of the United States (Page A 55).

Hawai'i County Charter, Section 3-17 (Page A 57).

U. S. Code Title 28, Part IV, Chapter 81, § 1257, State courts; certiorari (Release date: 2005-09-29), (a). (Page A 59)

Rules of the Supreme Court of the United States (Page A 60).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Hawai'i State Supreme Court ("HSSC") has created compelling reasons for the U.S. Supreme Court ("this Court") to hear this case under Rule 10 (page A 60). The HSSC's decision violates Rule 10 in that its decision, in relevant part: (b) "conflicts with the decision of another state court of last resort or a U.S. court of appeals " and (c) "a state court ...has decided an important federal question in a way that conflicts with relevant decisions of this Court" in legislative redistricting.

The Fourteenth Amendment of the United States Constitution. (Page A 55)

The Charter of the County of Hawai'i, State of Hawai'i, Article III, Section 3-17. (Page A 57)

STATEMENT OF THE CASE

In 2001, the Hawai'i County Reapportionment Commission ("RC") designed a County Council redistricting plan that included nonresidents, exceeded the ten-percent standard for total deviation once nonresidents were removed, failed to adopt legal criteria, violated numerous redistricting criteria, and failed to justify any violations or deviations. The Commission voted to pass that plan on December 18, 2001 without knowing the actual, legal deviation (without nonresidents). (Page A 121)

On July 19, 2002, the Circuit Court of the Third Circuit ("Third Circuit Court") upheld the Commission's plan with its inclusion of nonresidents and violations of socio-economic criteria but did not enter its judgment (Page A 52). In order to obtain a judgment with which to appeal to the HSSC, the Plaintiffs were forced to negotiate with the

County of Hawai'i and stipulate out all of the socio-economic criteria and take only the excess deviation to the HSSC. Final judgment was issued on January 24, 2003 (Page A 50).

On July 22, 2005, the HSSC ruled (Page A 24) that the nonresidents should have been excluded and the excess deviation was a prima facie case of discrimination in violation of the Equal Protection Clause. The HSSC then imposed its own rational state policy of "inclusiveness and equal representation" to justify a total deviation that "slightly exceeds" the 10% threshold due to the illegally included nonresidents, and a further assumption that the RC "considered other valid criteria under section 3-17 of the Charter". The HSSC ruled that the RC's plan was constitutional in a 3-2 decision with a Dissenting Opinion by two Justices (Page A 48).

On September 22, 2005, the HSSC excused the Commission's failure to address the excess deviation "because it was working from the 'total' as opposed to 'resident' population base, which presented only an 8.62% deviation" (Page A 5). The Court allowed de novo evidence from the Defendants but refused rebuttal, de novo evidence on fracturing communities of interest and vote dilution from the original filing from the Plaintiffs. The HSSC reiterated its assumption of "inclusiveness and equal representation" for the illegally included nonresidents. The HSSC rejected the Plaintiffs' argument that "good faith and honesty" were "subsumed" in its assignment of error, and the HSSC stated that it would not have accepted the argument regardless (Page A 13).

REASONS TO GRANT WRIT
by Question Number

1. The ten-percent standard was first articulated in dissenting opinions written by Justice Brennan in the cases of Gaffney v. Cummings, 412 U.S. 735, and White v.

Regester, 412 U.S. 755, in 1973. Justice Brennan stated that substantial equality has been determined to mean a total deviation of 10% or less. By allowing the RC's redistricting plan to stand when the total deviation "even slightly" exceeded the 10% standard, the HSSC violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("Fourteenth Amendment") that provides, in relevant part: "no state shall... deny to any person within its jurisdiction the equal protection of the laws." In 1968, this Court ruled in Avery v. Midland County (390 U.S. 474) that the equal protection principle of apportionment extended to units of local government.

When the HSSC determined correctly and rightly ruled that the nonresidents should not be included in the population base, the true total deviation for the RC's redistricting plan was identified as 10.89% and the RC's plan became constitutionally defective. In their Concurring and Dissenting Opinion on July 22, 2005 (Page A 48), Justice Nakayama and Chief Justice Moon of the HSSC stated,

> "a reapportionment plan that exhibits a total population deviation of more than ten percent presumptively violates the right to equal representation secured under the fourteenth amendment to the United States Constitution. Brown v. Thomson, 462 U.S. 835, 842-843 (1983) (citing Swann v. Adams, 385 U.S. 440, 444 (1967)). That presumption of illegality may only be dispelled by showing that rational public policies outweigh the ill effects of an apportionment scheme that materially enhances the representational power of some at the expense of others. Mahan v. Howell, 410 U.S. 315, 326 (1973)", (page A32).

In Swann v. Adams, 385 U.S. 440-447 (1967), this Court held that, "[T]he State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. Allowable deviations from equality of population between legislative

districts are confined to minor variations which "are based on legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims, supra, at 579...", and "[W]e reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts..."

The RC's violation of the Fourteenth Amendment (Page A 55) by including nonresidents began a series of compounding errors. The HSSC's removal of illegally included nonresidents proved a true deviation of 10.89% that violated the Fourteenth Amendment. The excess deviation diluted the votes of permanent residents in 8 of 9 districts. The inclusion of these nonresidents in District 2 forced additional permanent residents to be assigned to other districts causing District 2 to become a district of "supervoters" with the weight of their votes enhanced. This enhancement negatively impacted of voters of 8 of 9 districts in the County who had their votes diluted.

Further compounding the nonresident inclusion error, the RC assigned the most positive district percentage (+4.69%; too many people) to a high-growth area, and the most negative percentage (-6.20%; too few people) to District 2, a slow-growth district. The population bias in the RC's plan dilutes the weight of the vote of residents outside of District 2 for the next ten years. The RC must show that the residents whose votes are diluted by the excessive deviation served a compelling state interest and that the vote dilution is necessary to serve that interest. The RC failed to do so.

In Reynolds v. Sims, 377 U.S. 533, 579 (1964), Chief Justice Earl Warren stated that "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts."

In Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969), this Court rejected the argument, "that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the `as nearly as practicable' standard. The whole thrust of the `as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

In the dissent of White v. Regester, 412 U.S. 755 (1973), Justices Brennan, Douglas, and Marshall argued against an arbitrary cutoff point because "percentage figures tend to hide the total number of persons affected by unequal weighting of votes".

In Mahan v. Howell, (410 U.S. 315, 1973), this Court held unequivocally, "[F]irst, the paramount goal of reapportionment must be the drawing of district lines so as to achieve precise equality in the population of each district"..."[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of [410 U.S. 315, 340] equal population as is practicable. Reynolds v. Sims, 377 U.S. 533, 577 (1964); see also Kirkpatrick v. Preisler, 394 U.S. 526 at 531" ... "The Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest. Second, it is open to the State, in the event that it should fail to achieve the goal of population equality, to attempt to justify its failure by demonstrating that precise equality could not be achieved without jeopardizing some critical governmental interest... variations in weight accorded each vote can be approved only where the State meets its burden of presenting cogent reasons in explanation of the variations, and even then only where the variations are

small. See, e. g., Abate v. Mundt, 403 U.S. 182 (1971); Kirkpatrick v. Preisler, supra; Swann v. Adams, supra".

Appellant used mapping software that was a subset of the software used by the RC. Appellant obtained State's Office of Elections' population database for Hawai'i County including the information on the 871 nonresidents. 810 (93%) of the nonresidents lived in District 2. Appellant (and another Plaintiff) created an alternate plan and presented the plan to the RC but the RC did not make an honest and good faith effort when it voted against considering the alternate plan with its lower total deviation. The RC voted against the Appellant's plan because of "administrative convenience", even though the Appellant's plan had a lower deviation (Page A 121 and Question 13, Page 25). The RC made no effort to decrease the deviation of its plan or to justify its final deviation. The RC failed to provide any rational state policy that could outweigh the dismal effect of its plan on the residents (vote dilution, creating a district of "supervoters", splitting communities of interest, etc.). Mahan v. Howell, 410 U.S. 315, 326 (1973) stated that the overriding objective in reapportionment must be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. Id., at 579."

The RC ignored the mandates of the County Charter without justification, including, "Districts shall have approximately equal resident populations as required by applicable constitutional provisions". The Third Circuit Court erred in allowing the RC's redistricting plan to stand when it included nonresidents in the population base and would exceed the 10% standard if the nonresidents were removed. The HSSC removed the nonresidents but erred in allowing the RC's plan to stand because the total deviation were only "slightly over" the 10% standard for total deviation. The HSSC also erred in overlooking the

compounding errors caused by allowing the excessive deviation to stand.

In other redistricting cases before this Court where the same issues have arisen, this Court has disallowed such violations of the Equal Protection Clause of the Fourteenth Amendment, especially when no justification is provided. Other decisions by this Court set a precedent to overturn redistricting plans that exceed 10% without a rational state policy. Those rulings are correct and this Court should reach the same conclusion in this case and invalidate the RC's plan for exceeding the 10% standard.

2. In the years since Gaffney v. Cummings, 412 U.S. 735 (1973) and White v. Regester, 412 U.S. 755 (1973) that defined the 10% standard for total deviation, computer technology, computer mapping, and redistricting technology have improved dramatically. The HSSC's ruling that the RC's redistricting plan should be allowed to stand because it is "only slightly over the acceptable 10% standard" (10.89%) is not constitutional. "Slightly" was defined by the HSSC as less than 1%.

Today's computer and mapping technology makes it practicable and reasonable to keep the total deviation below 10% and the RC was using that technology in 2001. An alternate plan was submitted by the Appellant to the RC that was in time to meet the December 31, 2001 deadline, in a format compatible to the County of Hawai'i's mapping software, that had a total deviation of 8%, improved compactness, and that did not include nonresidents. The alternate plan proved that the RC could have decreased its original and final deviation.

Swann v. Adams, 385 U.S. 440 (1967), states, "appellants' proposed plan showed the feasibility of measurably reducing population differences between districts". The RC not only voted against considering the Appellant's plan but also failed to reduce its own deviation when it was feasible. Alternate plans with a lower total

deviation should be selected if the RC's deviation is not improved or justified. That did not happen in the Appellant's case. Selecting the plan with a lower deviation results in a more equally-weighted vote that complies with the Equal Protection Clause of the Fourteenth Amendment.

The HSSC's erred in allowing the RC's plan to stand because it was just "slightly" over the acceptable 10% standard when it was feasible with current technology to lower the deviation. This Court should overturn the HSSC's ruling in this case since it is indefensible.

3. The RC produced a plan that diluted the votes of eight districts and enhanced the votes of District 2 (South Hilo) by including 810 of 871 nonresidents in District 2.

The number of permanent residents for Hawai'i County in 2001 was 147,806. This number divided by the nine Council Districts equals the "ideal" district population of 16,423. The number of nonresidents identified in the State of Hawai'i's data was 871. 810 of the 871 nonresidents (93%) reside in District 2 (South Hilo). 810 nonresidents equal 4.9% of the "ideal" population. Of those 871 nonresidents, 234 are foreign-national students. Foreign-national student information was provided by the University of Hawai'i - Hilo by the Registrar's Office to the Appellant who provided the information to the RC on November 21, 2001 (Page A 102).

Since nonresidents are not permanent residents and the RC counted them as part of the permanent resident population of the District 2, the RC's action reduced the number of permanent residents allotted to District 2 and forced additional permanent residents into other districts in a cascading effect. The reduced number of permanent residents in District 2 became "supervoters". Their individual vote weighs approximately 4.9% more than voters of other districts even if there were no other deviations in population between districts which there were. In contrast to District 2, the other eight districts have the weight of their vote reduced by 4.9%

or more. The Council member representing District 2 had his vote enhanced as well.

In Reynolds v. Sims, 377 U.S. 533 (1964), at 567: "[T]he basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives."

In Swann v. Adams, 385 U.S. 440, 444 (1967), this Court stated, "[T]he State failed to present any acceptable reasons for the population variance between districts...though appellants' proposed plan showed the feasibility of measurably reducing population differences between districts"... "The State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. Pp. 443-447." The County (State), not the HSSC, must articulate valid reasons to depart from excepted and mandated standards.

Creating a district of "supervoters" should not be permitted. This Court should invalidate the RC's plan for failure to: articulate acceptable reasons for population variances between districts, justify the vote enhancement in District 2, and justify the vote dilution in the other eight districts.

4. The HSSC and/or the Third Circuit Court should not be permitted to allow a redistricting plan to stand where several redistricting criteria in the County Charter were ignored and incumbent protection gerrymandering was in effect. Socio-economic criteria were discussed in the testimony of David Holzman, PhD - Sociology, (October 8, 2001, Page A 88)

a) "Districts shall have approximately equal resident populations as required by applicable constitutional provisions" per the County Charter (Page A 58).

The nine Council Districts designed by the RC do not have approximately equal resident populations within the plus or minus 5% deviation standard or in the overall 10% standard. Although warned by public testimony that their

deviation would exceed 10% with the removal of the nonresidents, the RC failed to justify the excess deviation above 10%. The HSSC issued its ruling that nonresidents should not be included in the population base. The RC's plan then had a deviation in District 2 of -6.20% and in District 8 of +4.69%, resulting in a total deviation of 10.89%." (Page A 38)

If the RC had completed the most modest "due diligence" to adopt by vote and follow established criteria for redistricting, the RC could not have strayed so far from protecting voter's rights. The lack of due diligence by the RC culminated in a plan with multiple violations of established criteria.

This Court ruled in the aforementioned cases that the criteria violations (compactness, fracturing communities of interest, incumbent protection, favoring individuals, and exceeding the 10% standard) invalidated those redistricting plans, and this Court should rule the same way in this case.

b) Districts should be contiguous and compact per the County Charter (Page A 58).

This Court set standards for fairness in redistricting. These criteria are listed in "How to Draw Redistricting Plans That Will Stand Up in Court" by Peter S. Wattson, Counsel to the Minnesota Senate and includes the criteria that districts must be compact (page A 174). The RC designed Council Districts that were not as compact as is practicable.

In Hawai'i County's 1991 redistricting, Lower Puna had its own Council District. Council District 6 included Hilo and Upper Puna and extended for 118 miles across the Island of Hawai'i to join three separate communities of interest - Upper Puna (east side), Ka'u (south), and South Kona (west side). By 2000, population increases in Upper and Lower Puna justified two Council Districts (1.906 seats) that included a Council seat for Upper Puna.

In 2001, the RC insisted on retaining the basic shape and size of District 6 which required the continued fracturing of

the Upper Puna community into District 3 (Hilo) and old District 6 which is still is 118 miles across. This extreme distance and the fracturing of Upper Puna are no longer reasonable, rational, or justified with the population increase in Puna.

Compactness is no longer just a geometric measurement. In the case of Reapportionment of Town of Hartland, 160 Vt. 9, 21-22 (1993), the Vermont Supreme Court stated that, "[C]ompactness and contiguity requirements ultimately concern "the ability of citizens to relate to each other and their representatives and ... the ability of representatives to relate effectively to their constituency." (Wilson v. Eu, 1 Cal.4th 707, 4 Cal.Rptr.2d 379, 387, 823 P.2d 545, 553, 1992). The ability of Puna and Kona citizens to relate to each other and to their representative continues to be strained due to the 118 miles encompassed by District 6 in the RC's plan and is today unjustifiable as it was in 2001.

c) Districts should attempt to preserve communities of interest.

In "How to Draw Redistricting Plans That Will Stand Up in Court", Mr. Wattson, includes the criteria that districts should attempt to preserve communities of interest (pages A 174).

In Miller v. Johnson, 515 U.S. 900, 919-20 (1995), the U.S. Supreme Court expanded the fairness criteria to include "respect for . . . communities defined by actual shared interests."

In Kenai Peninsula Borough v. State, 743 P.2d 1352 (Alaska 1987), the Alaska Supreme Court recognized that a reapportionment plan that unnecessarily divides a municipality in a way that dilutes the effective strength of voters "by invidiously minimizing that class's right to an equally effective vote" will raise an inference of intentional discrimination.

The RC not only fractured the Puna community that deserved two Council Districts based on its population, it also split the village of Waimea. The overwhelming public testimony from the Puna and Waimea communities was their desire to keep their neighborhoods and communities together. Both of these community fractures were unnecessary as proved in the Appellant's plan but the RC's plan prevented both Upper Puna and Waimea from voting as a community and diluted the effective strength of their respective voters. Both communities objected to the RC's plan to no avail.

In the Motion for Reconsideration (Civ. No. 01-1-0092) on September 22, 2005 (Pages A 8 -12, A 18), the majority of the HSSC referenced Appellant's arguments on "communities of interest", the fracturing of the District of Puna, and vote dilution, but regardless, allowed the RC's plan to stand.

d) Incumbency Protection Gerrymandering and the Charter's criteria of "No district shall be drawn to unduly favor or penalize a person or political faction" (A 58).

In Ely v. Klahr, 403 U.S. 108 (1971), this Court held that "the incumbency factor has no place in any reapportionment or redistricting".

The RC's plan protected all nine incumbents inside their respective Council districts and advantaged them by protecting them from facing each other in the next election. The RC violated the County Charter because incumbents were favored by the RC's plan with protection from other incumbents.

In Black's Law Dictionary (Seventh Edition), a political subdivision is defined as a, "[d]ivision of a state that exists primarily to discharge some function of local government." Political subdivisions include: county, city, township, judicial district, school district, etc. There is nothing in Black's definition to indicate that the location of an incumbent's residence is considered a "division of a state"

or a "function of local government" that should be protected so that the incumbent could stay in his/her same council district or be shielded from running against another incumbent if district boundaries ever change. Incumbents do not own their council districts nor have any right to expect that redistricting will retain them inside of new district boundaries. The very purpose of redistricting is to level the field for future elections.

Dr. Michael McDonald of the "United States Election Project" (Page A 147) advises, "The goal of an incumbent protection gerrymander is to secure re-election for incumbents... Incumbent protection gerrymanders tend to produce the least competitive elections. "He stated that in "incumbent-blind" redistricting, those drawing the maps cannot know the location of the incumbent's residences and improves competitiveness.

The RC violated the principle of Ely v. Klahr's "incumbency factor" and the County Charter's criteria to not "unduly favor or penalize a person or political faction" (Page A 58), without justification. The final design of the RC's plan indicates that the RC had a non-publicized and unjustified criterion of incumbent protection rather than achieving fair redistricting. The results of the RC's plan speak for itself.

5. The HSSC allowed the RC's plan to stand although the RC ignored documented growth rates. The RC placed the most positive deviation percentage (+4.69%; too many people) in areas of high growth and the most negative deviation percentage (-6.20%; too few people) in District 2, an area of low growth, thereby exacerbating the vote dilution already caused by inclusion of 810 nonresidents. The RC's decision occurred despite the public's testimony about high growth areas needing the lowest percentages of deviation so that over the years between the 2000 and 2010 census, the population deviations will equalize as well as

the weight of each vote (Page A 102). With the RC's plan, the vote dilution will be exacerbated over the next ten years.

In the Appeal from the Third Circuit Court (Civ. No. 01-1-0092) on July 22, 2005, the HSSC noted the Council Districts whose votes were enhanced or diluted by the RC's plan, "According to Appellants' calculations, the resident population of District 2 was -6.20% below the ideal mean (the latter category) and the resident population of District 8 was +4.69% above the ideal mean (the former category), thereby resulting in a total deviation of 10.89%" (page A 38).

Growth rates in Hawai'i County are well documented in the County's 2000 Data Book which was available to the RC (Page A 222). In Kirkpatrick v Preisler, 394 U.S. 526, 535 (1969), this Court held, "[W]here population shifts can be accurately predicted, States may properly consider them and apply them... but throughout the State in a systematic manner"... "Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them... Findings as to population trends must be thoroughly documented"... The District Court found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act." 279 F. Supp., at 983.

This Court should invalidate the RC's plan for failure to use documented growth rates as a criterion, and the RC's use of deviations wrongfully applied to high- and low-growth areas that will exacerbate population deviations for the next ten years.

6. Some Federal laws and U.S. Supreme Court case precedents regarding redistricting have been extended to include municipal governments (Reynolds v. Sims, 377 U.S. 533, 1964). This Court determined that under the Fourteenth Amendment's Equal Protection Clause (Page A

55), the "one person-one vote" standard must be met in any redistricting plan. Mandated State and/or County redistricting criteria should also be incorporated into the 2001 RC redistricting plan unless legal justification for not doing so is provided.

The decisions of this Court when applied exactly to the same points of law in another case are considered to be binding on all other courts of the United States (stare decisis). Trial courts are required to view the decisions of higher courts strictly. By extrapolation, the redistricting plan of the RC (a governmental agency) should also use the same constitutional laws and mandated precedents to protect our most basic right - the right to an equal vote.

The RC was very cognizant of mandated redistricting criteria requirements but refused to apply them (Page A 72). The RC tried to avoid, violate, or ignore constitutional and case law, and partially disenfranchised most of the Hawai'i County voters. (See Questions 1, 2, 3, and 4.a.)

If this Court does not require the RC to incorporate the federally extended mandates, laws, and precedents and also invalidate the RC's unjustified plan, then other agencies may claim that they are excused from applying Federal, State, and local redistricting criteria as well. There can be no assumption that the RC followed mandated criteria and laws. The fact is that those mandated criteria and laws were not incorporated into the RC's redistricting plan nor were the deviations justified.

This Court should invalidate the RC's plan for failure to incorporate: a) Federal law and binding precedents that must be followed by the smallest governmental units, and b) County mandates. This Court should rule that the foregoing Federal law, binding precedents, and County mandates are required to be incorporated into Hawai'i County's redistricting plan and further, into the County Charter as mandates, not guidelines, to prevent future illegalities.

7. The RC should be required to publicly and formally adopt, as close to the inception of the redistricting process as practicable, all redistricting policies to which it must adhere, and provide those policies in writing as part of the submission of the RC's final redistricting plan. The RC was advised that it needed to choose those policies by which to reapportion Hawai'i County. Dwayne Yoshina, Chief Election Officer for the State of Hawai'i advised the RC on May 3, 2001 during the RC's first meeting, "...[w]hat I would suggest is that you take that time and you form all your policy decisions" (Page A 64).

The RC had ample information and ample time to formally adopt legal redistricting criteria against which to assess its plan for legality and fairness standards. This failure indicates gross incompetence, some motive to prevent the residents of the County of Hawai'i from having a fair redistricting plan, and/or a hidden agenda. Certainly, an appearance of impropriety exists and the illegality of the RC's plan speaks for itself.

With the exception of voting to illegally "include all people" (nonresidents) on June 22, 2001 (Page A 67-68), the RC failed to define any other policy nor did it describe "include all people" as equal representation. Perhaps, the failure to adopt policies misled the RC into believing that any private agenda was permitted or any decision that it made was justified. The public testified repeatedly that the RC was making legal mistakes. The RC had at least three licensed attorneys as Commissioners including Commissioner Van Pernis who made the motion to "include all people". The RC still refused to follow legal precedents and law.

The Appellant started with no knowledge of reapportionment or redistricting. In a search of the internet, a document titled, "How to Draw Redistricting Plans That Will Stand Up in Court " by Peter S. Wattson, Counsel to the Minnesota Senate, 2002 (Page A 156), was discovered. This

document was used by the Appellant to determine appropriate criteria from which the Appellant's redistricting plan was designed. The Appellant's case makes a strong argument that if members of the public can educate themselves to understand fair redistricting and produce an alternate plan that meets mandated criteria, then there is no reason that a governmental agency should do less.

To require that the RC establish redistricting criteria at its inception (before establishing boundary lines) and to follow those criteria is the minimum requirement for a fair redistricting plan. To allow less, would be to imply that redistricting laws and binding precedents are discretionary and not imperative on the RC.

If all laws, criteria, and precedents required for Hawai'i County redistricting had been identified and adopted, it would have been obvious to the RC, not just the public, that the RC strayed widely from its sworn duty to provide a fair and honest reapportionment. Additionally, the intent of the RC's decisions would have been clear to the HSSC since there would have been a list of criteria adopted against which to assess the RC's final plan. There were no legal criteria adopted and no justification for having none submitted with the RC's final plan. The HSSC upheld the RC's plan based on incorrect information, hearsay evidence, statements from incumbent Councilmembers (non-Commissioners), and assumptions of intent. The Appellant's case proved that there was a need for the RC to define its methodology whereby the RC adopted, then used criteria to enable it and the public to determine if the redistricting results were valid. This Court should invalidate the RC's plan for its failure to establish, adopt, and use legal redistricting policy and criteria.

8. The mere mention of valid criterion by a single or even multiple Commissioners, or non-Commissioners should not constitute rational consideration, a "rational state policy", adoption of the criterion, or even

acceptance of the criterion by other Commissioners. Without a public discussion, and especially a vote of the redistricting agency's members, no one can know the thinking or acceptance level of each of the Commissioners. In every case of a criterion mentioned, the question should be asked; did the majority of the RC agree that each criterion is valid, adopted, and used to measure the correctness and legality of the RC's plan? Without knowing the thoughts of each Commissioner by their statements and votes, the correct answer to the question is unknown because there is no definitive evidence. Because the HSSC cannot and does not know the thoughts of the Commissioners, who did not speak on each criterion mentioned, and the Commissioners did not express their thoughts through a vote, the HSSC has no basis for the assumptions it used to explain the failures and errors of the RC.

The RC knew that it should abide by the County Charter, Section 3-17 (Page A 58), criteria as the criteria were commented on by Chairperson Van de Car on October 8, 2001 (Page A 70). However, the criteria were not adopted by the RC and three of the four mandated County Charter criteria were violated in the RC's plan design (Page A 58). Therefore, an assumption that the RC considered and/or used the criteria is not valid.

The HSSC on July 22, 2005 held that the RC's plan had "a total deviation of 10.89%, such a deviation in this unique instance (a) was minimal, (b) apparently included the Commission's consideration of other valid criteria under section 3-17 of the Charter"(Page A 25). Applying the phrase 'unique instance' and 'apparently' indicates assumptions that do not justify the violation of the Equal Protection Clause of the Fourteenth Amendment (Page A 58). Assuming to know the Commissioners' minds without a vote would be tantamount to mind-reading.

The RC never provided proof to the Third Circuit Court or the HSSC that they adopted legal criteria or a rational

state policy to justify its violations. The mere mention of a criterion without a vote should not be accepted as consideration or adoption of criteria, or a rational state policy. This Court should overturn the HSSC's imposed and unjustified "rational state policy" based on the mention of criteria rather than adopted and incorporated criteria.

9. The HSSC erred in imposing a "rational state or public policy" of "inclusiveness and equal representation" on the RC's redistricting plan when the RC failed to provide a formally adopted, written policy, or justification. The RC approved a motion to "include all people" (Page A 68) but never stated that the motion promoted "equal representation". It is the RC's constitutional responsibility, not the Court's burden, to provide formally adopted and written criteria with supporting evidence that justifies a plan that exceeds the 10% standard or deviates from any other criteria, standard, precedent, or law.

A serious problem exists in allowing the HSSC to use facts not in evidence in the RC's plan as justification for the RC's actions or lack of actions. This would set a precedent for other redistricting agencies that a court can supply an assumed, after-the-fact justification for erroneous redistricting if the agency does not supply a justification of its own.

In Swann v. Adams, 385 U.S. 440-447 (1967), this Court held that, "[T]he State's failure to articulate acceptable reasons for population variances between districts invalidates the reapportionment plan. "

The Appellant's case underscores the need for the Court to require written documentation from redistricting agencies on policy, criteria, and justification for deviations and divergences from legal standards in even the smallest governmental units. The HSSC's imposed "rational state policy" cannot be defended by the record and should be overturned by this Court.

10. The HSSC erred in making an assumption that the RC "evidenced an intent to achieve inclusiveness and equal representation" or a "rational state policy" (Appeal from the Third Circuit Court, July 22, 2005, Page A 25). The basis for the HSSC's imposed "rational state policy" was: a) incorrect and hearsay statements made by Commissioner Van Pernis on the number of military personnel with no mention of other nonresidents (Page A 68), and b) followed by that Commissioner's motion to illegally "include all people"(even the nonresidents).

Commissioner Van Pernis' hearsay testimony grossly underestimated the nonresident population that he provided to the RC ("20-30 people currently stationed here") on June 22, 2001 (Page A 68). This incorrect and hearsay evidence was contradicted by public testimony (Page A113) and proved incorrect by the State Office of Elections' data. Such testimony should be discounted completely and no assumption of "inclusiveness or equal representation" should be construed from such evidence.

The total number of nonresidents according to the State of Hawai'i, Office of Elections' data was 871. Of those nonresidents, 234 of the nonresidents are foreign-national students. Foreign-national student information was provided by the University of Hawai'i - Hilo, Registrar's Office, to the Appellant who provided the information to the RC. 810 of the 871 nonresidents (93%) reside in the single Council District of South Hilo (District 2). 810 nonresidents equal 4.9% of the "ideal" population.

The RC was very aware of the probability that the State Reapportionment Commission would disallow nonresidents in the State population base. David Rosenbrock was introduced to the RC as the Project Manager for the Hawai'i State Office of Elections on May 3, 2001 (Page A 64). During that meeting, Mr. Rosenbrock advised the RC regarding nonresidents, "Well, I'm almost positive they're going to be minused out." The nonresidents were minused out by the

State in August 2001 but the RC did not reconsider their decision to include the nonresidents even though the Appellant notified the RC on November 21, 2001 (Page A 113) of the State's action.

The HSSC made mention of the comment to "include all people" made by Commissioner Van Pernis (Page A 68). The HSSC assumed the passage of a motion to illegally "include all people" (even nonresidents) evidenced an intent to provide "inclusiveness and equal representation", but including foreign nationals, nonresident military, nonresident military dependents, and nonresident students does not embrace the concept of inclusiveness in redistricting which is reserved for permanent residents. The RC never discussed or used the terms "inclusiveness" or "equal representation". Equal representation was denied to the permanent residents by the inclusion of nonresidents because the inclusion of nonresidents created enhanced votes for some permanent residents and diluted votes for other permanent residents.

The HSSC excused a 10.89% deviation although the RC never reconsidered excluding nonresidents when confronted with the true facts (Page A 113). Then the HSSC imposed its own "rational state policy" that stated the RC was trying to provide "inclusiveness and equal representation".

In their Dissenting Opinion on September 22, 2005, Chief Justice Moon and Justice Nakayama discussed the framework for assessing the constitutionality of a redistricting plan stated,

> "...The foregoing framework for assessing the constitutionality of a redistricting plan pragmatically acknowledges that government must, in certain circumstances, be allowed to pursue redistricting policies that incidentally enhance the representational power of some members of the electorate at the expense of others. It was never intended to function as a curative device for excusing, after the fact, a

reapportionment authority's gross computational errors or inadvertent methodological mistakes -- especially where, as here, those missteps were solely responsible for tainting the redistricting plan with the presumption of unconstitutionality." (Page A 20-21)

Equating "inclusiveness" of nonresidents (e.g. foreign nationals, U.S. nonresidents, etc.) to "equal representation" contradicts the very principles of redistricting. It invalidates the redistricting process and condemns the ultimate plan to be unconstitutional. The RC actually gave nonresidents "double representation", in their home state or nation and in Hawai'i County as well, to the detriment of the permanent residents. This Court should overturn the HSSC's decision to impose its own rational state policy of "inclusiveness and equal representation" to support the RC's plan that illegally included nonresidents.

11. The RC voted against even considering the Appellant's plan that had a lower deviation than its own plan and it also failed to justify the inclusion of nonresidents. The reason for not considering the Appellant's plan was given by Commissioner Ferguson on December 18, 2001, "[w]e did hear all of your arguments, you were not shut out, we listened to whatever you had to say, we just don't agree" (A143).

In Ziols v. Rice County Board of Commissioners, No. C3-02-1667 (Minn. App. May 20, 2003), the Court of Appeals affirmed the decision of the Judge of the district court that, "[T]he failure of the county board to give a reason for not adopting one of the 12 other plans that were more equal in population was an abuse of its discretion". "[W]hile the board was not required to pick the plan with the lowest population deviation from the ideal, it must explicitly address all of the statutory factors, particularly equal population. Slip op. at 13."

In both the Appellant's case and Ziols v. Rice County, the Commissions did not justify its adoption of a plan

containing greater population deviations than other available plans offered. If anything, the Appellant's case is even stronger due to the deliberate inclusion of nonresidents, most of whom (93%) are located in District 2 (South Hilo). The RC abused its discretion by voting against even considering an alternate plan with lower deviations, did not adopt an offered plan that had a lower population deviation, did not adjust its own deviations, and did not explicitly address all statutory factors. The precedent set in Ziols v. Rice County is reasonable and just as a method of obtaining plans that comply as closely as practicable with the Equal Protection Clause of the Fourteenth Amendment (page A 55). This Court should rule that the failure to explicitly address all statutory factors, and the abuse of discretion in voting to not consider an alternate plan with lower deviations, invalidates the RC's plan.

12. The RC should not be permitted to vote against even considering an alternate plan that was presented in ample time and had a lower deviation, greater compactness, no nonresidents, and met established criteria and precedents. On October 18, 2001, Appellant and Charles Flaherty presented an alternate redistricting plan. The total deviation of Appellant's plan was less than 6% initially. The RC did not ask any questions of either of us (Page A 101). The Commissioners continued to make changes to its plan based on 1991 Council Districts. Public testimony during the session supported the alternate plan.

On November 21, 2001, Appellant presented slight modifications to the Appellant's plan (deviation of 8%) and more information for the basis of the Appellant's plan. After the presentation, Commissioner Lisa Barton made a motion to consider the Appellant's plan. The motion failed. (Page A 120) The Commissioners again continued to make changes to the RC plan based on 1991 Council Districts. Public testimony continued to support the Appellant's plan.

At the last RC session on December 18, 2001 (Hawai'i County RC meeting), Al Konishi, County Clerk and a licensed attorney, advised, "If you make any major changes to this [RC's] map that is behind you, they are not going to make the deadline"... "if you make major changes, whether it may be the CERG [Appellants] map, Mrs. Jacobson's map, maps 1-9, you make major changes today, you're gonna have a very difficult time making a December 31st deadline" (Page A 137, 142). The RC did not request any advice from Corporation Counsel. A motion was made and passed on December 18, 2005 to adopt the RC's plan without knowing the total population deviation. Passing a plan to accommodate the Elections staff responsible for completing the boundary descriptions and using the mandated deadline as the reason is a poor excuse for illegal redistricting. If criteria used for the RC's plan and the Appellant's plan been matched and population deviations compared using due diligence, it would have been obvious that the RC's plan would have failed scrutiny.

This Court should rule that without due diligence, it is not permitted to vote against even considering an alternate plan with a lower deviation.

13. The HSSC chastised the Appellants for raising de novo issues that were stipulated out of the appeal in the January 6, 2003 stipulation to amend First Amended Complaint and for entry of judgment in order to reach the HSSC. Those issues included: failure to use rational or objective methodology, wrongfully submerging communities of interest, and fracturing Puna. The HSSC stated, "While this explanation may have raised a concern, Appellants withdrew these arguments. The stipulation stated: Plaintiffs and Defendants herein stipulate to the amendment of the First Amended Complaint filed here on March 6, 2002 as follows:

1. Plaintiffs withdraw and delete Paragraphs 12.a to 12.f;

2. Plaintiffs withdraw and delete Paragraphs 12.j to 12.n.

The effect of the deletions is to withdraw Plaintiffs' allegations that the County of Hawai'i 2001 Reapportionment Commission failed to use a "rational or objective methodology" (¶¶ 12.a to 12.f) and wrongfully submerged communities of interest into larger districts (¶¶ 12.j to 12.n) but not Plaintiffs' allegations as to the population base that the County of Hawai'i 2001 Reapportionment Commission used (¶¶ 12.g to 12.i and 12.o to 12.p) ". (Page A 9-10)

It is true that the Stipulation withdrew these concerns. The Appellants agreed to withdraw key arguments in order to make a timely appeal to the HSSC. The HSSC sought additional information from the Defendants after granting the Appellants their Motion for Reconsideration. The Defendants responded with erroneous de novo information which the Appellants were not allowed to rebut.

The HSSC stated in its decision (Opinion of the Court, July 22, 2005) that, "Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Pac. Int'l Serv. Corp. v. Hurip, 76 Hawai`i 209, 213, 873 P.2d 88, 92 (1994)." "A trial court's conclusions of law are reviewed de novo under the right/wrong standard. Fujimoto v. Au, 95 Hawai`i 116, 137, 19 P.3d 669, 720 (2001). Under this standard, the trial court's conclusions of law are not binding upon the appellate court and are freely reviewable for its correctness. Id." HSSC, Appeal from the Third Circuit Court (CIV. NO. 01-1-0092); (Page A 28).

This Court has the right to review the Third Circuit Court's and the HSSC's conclusions of law, decisions, and any other material involved. The Third Circuit Court did not grant the Appellants the judgment they legally deserved

nor did the HSSC. The HSSC, the Third District Court, and the RC made a multitude of errors that will set an unjustified precedent and that deserve the attention of this Court to correct.

CONCLUSION

The failure to adopt legal policies produced a situation where the RC violated numerous laws and precedents, forced an illegal plan on the residents, and now this Court must sort through the minutiae in documents to determine what the agency might have been using as criteria. It is reasonable to expect that redistricting criteria be publicly discussed and adopted and not left to the imagination.

The RC failed to perform due diligence or to formally adopt criteria, erred in using the wrong population base that included nonresidents, exceeded the 10% standard for total deviation, violated the criteria of compactness and preserving communities of interest, ignored growth as a criteria, included incumbent protection gerrymandering, and diluted/enhanced votes in its plan design. These acts in and of themselves violate the very laws the RC swore to uphold. The flaws in the RC's plan indicate not only a lack of "rational state policy" but a total disregard for the law and the residents who must suffer until 2011 with the RC's plan. The RC hid behind a deadline that would dissolve the RC and possibly, its responsibility. Even presented with factual evidence, the RC refused to reconsider any of its inappropriate actions, votes, or decisions.

The Third Circuit Court erred by allowing the wrong population base to be used by the RC, ignored socio-economic criteria, and allowed the RC's plan to stand when that plan unconstitutionally exceeded the 10% standard for total deviation once the illegally included nonresidents were removed.

The HSSC correctly ruled that the inclusion of the nonresidents was wrong but it erred when it allowed the

RC's plan to stand despite the plan's total deviation exceeding the 10% standard. The HSSC also erred in ruling and imposing its assumption of "inclusiveness and equal representation" based on the incorrect comments of one Commissioner, statements by incumbent Councilmembers, and a vote to illegally include nonresidents. Its reliance on inaccurate, hearsay information disregards the very concepts of truthful evidence and justice in our court system.

If the incorrect decision by the HSSC is not overturned, far-reaching precedents will be set for other redistricting agencies that a court may: assume a "rational state policy" where none exists; impose its own "rational state policy"; provide criteria if an agency fails to adopt public, formal, written criteria; equate "inclusiveness" of nonresidents to equal representation; allow redistricting plans to exceed the 10% standard without justification; allow inaccurate, hearsay testimony as justification for an illegal redistricting plan; allow the redistricting agency to disregard an alternative plan that met constitutional standards, had a lower deviation, and was more compact; assume comments made by one Commissioner are agreed to by all Commissioners; and ignore County, State, and Federal law and precedents, and County mandates in redistricting.

In the Concurring and Dissenting Opinion on the Motion for Reconsideration issued September 22, 2005, Chief Justice Moon and Justice Nakayama wrote:

> "...the majority's opinion, Riley v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992), in no way supports the conclusion that the 2001 County of Hawai'i Reapportionment Commission (Commission) followed a "rational" redistricting policy that justifies what is otherwise an unconstitutional redistricting plan." (Page A 20)
>
> "...Neither Riley, nor for that matter, any of the other cases cited by the majority, endorses the majority's contention that a presumptively unconstitutional

redistricting plan may be "rationalized" when the redistricting authority, due to an unrealized computational error, inadvertently devises a plan that exhibits a total population deviation in excess of 10 percent." (Page A 21)

"...The right of equal representation is far too hard-won a liberty for its erosion to be justified so blithely. Accordingly, I must dissent." (Page A 22)

For the foregoing reasons, the judgment of the HSSC should be reversed and the 2001 RC's plan should be declared invalid. Redesign of that plan needs to be addressed in this case.

I am not seeking to overturn the past elections that were based on the RC's incorrect plan nor am I seeking to overturn any legislation passed by those Councilmembers elected under the RC's plan because such actions would cause havoc for the County of Hawai'i and its residents. As a Pro Se Petitioner, I am not sure that I may request the following actions of this Court and I apologize profusely if I exceed my rights in making these requests.

I respectfully request that this Court:

1) consider the socio-economic criteria de novo,
2) disallow the RC's redistricting plan to be imposed any longer on the residents of the County of Hawai'i,
3) not allow the RC or any of its 2001 Commissioners to have any part of designing a new redistricting plan because of their biases,
4) assign a Special Master to receive testimony and plans from the public,
5) allow State and Federal elections to go forward as planned in Hawai'i County but delay the elections for Hawai'i County offices until a reapportionment plan is accepted by a Special Master,
6) suggest the criteria as set forth in Appellant's Redistricting Criteria (Page A 153) be used in developing the

redistricting plan for Hawai'i County, and any other criterion that the Court deems reasonable, and
7) apply any appropriate, corrective action that the Court deems necessary.

Please help the residents of Hawai'i County obtain a fair and legal redistricting plan and an equal vote.

I thank the Court for its time and consideration of my case.

Dated: December 19, 2005
Brenda J. Ford, Pro Se

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FOR PUBLICATION

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR, Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI`I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

MOTION FOR RECONSIDERATION

(CIV. NO. 01-1-0092)

SEPTEMBER 22, 2005

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

(By: Levinson, Acoba, and Duffy, JJ.; With Nakayama, J., Dissenting, With Whom Moon, C.J., Joins)

Plaintiffs-Appellants Citizens for Equitable and Responsible Government, Brenda J. Ford, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, and Ronald C. Phillips (collectively, Appellants) filed a motion for reconsideration (the motion) of this court's July 22, 2005 published opinion (the opinion), in which a majority of this court affirmed the decision of the circuit court of the third circuit (the court) to uphold the reapportionment plan of the County of Hawai'i 2001 Reapportionment Commission (the Commission). Citizens for Equitable & Responsible Gov't, No. 25614, slip op. at 25 (Haw. July 22, 2005).

I.

In the motion, Appellants argue that (1) this court cannot substitute its findings for that which the Commission and the court should have, but did not, make, (2) this court cannot refer to the public testimony of Julie Jacobson, a person who is not a member of the Commission, as evidence of the Commission's unarticulated intent, (3) this court's substituted justification for deviations in excess of 10% is no justification at all, (4) lack of good faith and honesty was subsumed in Appellants' assignment of error, (5) the plan is invalid if the plan is constitutionally defective, and (6) this court's conclusion that the court and the Commission erred in using the wrong population base, means that it should simply reverse the court's judgment. Accordingly, Appellants request that this court (1) strike any reference to Jacobson's testimony, (2) strike all references to the purported justification of the Commission for offering a plan with deviations in excess of 10%, (3) reverse the court's judgment, and (4) invite the parties to submit further pleadings as may be appropriate to the amended decision. For the reasons discussed herein, the motion for reconsideration is granted in part as to the reference to the Jacobson testimony, but denied in all other respects. [1]

II.

Addressing first Appellants' second point, the challenge to Jacobson's testimony, Appellants maintain that this court "relie[d] upon the testimony of a person who is NOT a member of the Commission[, Jacobson,] to justify the . . . Commission's action below" and that "[s]uch reliance is inconsistent with" Dines v. Pacific Insurance Co., 78 Hawai`i 325, 893 P.2d 176 (1995). (Capitalization and emphasis in original.) However, the opinion does not state that Jacobson was a member of the Commission, but identifies her as a Hawai`i County Councilmember. It may be assumed that Jacobson's testimony apprised the Commission of how using a total population base can achieve inclusiveness and equal representation. The opinion refers to Jacobson's testimony as follows:

> [W]e cannot say that no rational basis underlay the 10.89% deviation because, akin to the approach exemplified by the commission member's testimony in Riley, the Commission in the instant case, by using "total" population, evidenced an intent to achieve inclusiveness and equal representation.
>
> . . .
>
> For at the second meeting of the Commission, Hawai`i County Councilmember Julie Jacobson testified in favor of "using the population as the basis for the districting," stating that,

each human being has needs for the government serves [sic] and it doesn't matter if you're one day old, if you're 99 years old, if you vote or don't vote, or any other of those variables . . . each person needs to be considered and I think especially with the complexity of infrastructure issues, that we deal with, that's why it's important.

Opinion at 22. [2]

Also, Appellants state for the first time in the motion that Jacobson later retracted the statement quoted in the opinion by rejecting the Commission's plan. It should be noted that Appellants did not challenge Jacobson's testimony in their reply brief, even though Defendants-Appellees, County of Hawai`i, County Clerk, County of Hawai`i, and Lloyd Van De Car, Chairman of the Commission (collectively, County Appellees), cited to Jacobson's testimony in their answering brief. Appellants, therefore, failed to raise Jacobson's supposed retraction of the quoted statement that they tardily do now.

However, it appears that Jacobson had recanted the quoted statement. Appellants state that at the Commission's final meeting on December 18, 2001, Jacobson "rejected her own statement." (Emphasis in original.) Upon review of the record on appeal, it appears that Jacobson's December 18, 2001 testimony was never made part of the record. [3] Appellants have since attached the subsequent Jacobson testimony to their motion as Appendix 32, as well as a declaration by their attorney, which certifies that the attached minutes "are public documents . . . that are found on the County of Hawai'i website at Hawai'i-county.com." Although the subsequent Jacobson testimony need not be considered by this court, see Orso v. City & County of Honolulu, 55 Haw. 37, 38, 514 P.2d 859, 860 (1973) ("[A] question involving evidence not in the record cannot be reviewed on appeal.") (citation omitted), in light of the fact that Jacobson retracted her statement, a fact only now raised by Appellants, this court grants Appellants' request to strike any reference to the Jacobson testimony. [4] In doing so we observe that it is a fundamental and elementary proposition that counsel is obligated to present an accurate record on appeal.

III.

In their first point, Appellants argue that it is the "Commission's constitutional obligation, not this [c]ourt's burden, to offer evidence that justifies a plan that contains deviations in excess of 10%, that favor pre-existing [c]ounty [c]ouncil districts and that 'fractures' the judicial district of Puna."[5] (Emphasis in original.) Appellants maintain that this court "overlook[ed] . . . that officials in Riley[v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992),] actually testified to the court to explain their reason for offering a plan that contained deviations in excess of 10% [and that] . . . [n]either the trial court nor the appellate court in Riley searched through the record to fathom the basis for official action."

To the contrary, this court did not "overlook" the fact that the commission member in Riley "actually testified" inasmuch as the opinion expressly states that "[a]t the hearing before the trial court, a commission member testified that 'the overriding principle' followed by the commission in redistricting 'was equal representation.'" Slip op. at 21 (quoting Riley, 843 S.W.2d at 833) (emphasis added). The rule extrapolated from Riley was that a redistricting plan survives equal protection scrutiny where its variation is "only slightly over the acceptable 10% variation[,]" and "the commission's 'systematic approach . . . reveal[s] a rational policy of redistricting.'" Id. (quoting Riley, 843 S.W.2d at 833) (emphasis added).

The opinion agrees with Appellants that "the Commission did not address the deviation question because it was working from the 'total' as opposed to 'resident' population base, which presented only an 8.62% deviation." Id. at 22. But, it was decided that similar to Riley, "the 10.89% total deviation of the Commission's plan is 'only slightly over the acceptable 10% variation[,]" id. at 21, and "akin to the approach exemplified by the commission member's

testimony in Riley, the Commission in the instant case, by using a 'total' population, evidenced an intent to achieve inclusiveness and equal representation." Id. at 22 (emphasis added).

Even without the Jacobson testimony, which is stricken, Commissioner Mark Van Pernis's "motion to 'include all people,'" which was "put to a vote and carried, evidenc[ed] that the Commission was motivated by inclusiveness, as opposed to a discriminatory purpose." Id. Moreover, the opinion cites to three additional criteria for redistricting as mandated by section 3-17(f) of the Charter of the County of Hawai'i (the Charter). See id. at 23. As the opinion notes, "Appellants [did] not contend that the Commission failed to consider [these] other redistricting criteria under the Charter or that such criteria would not support a slightly greater deviation than the 10% prima facie threshold." Id.

Additionally, County Appellees, in their memorandum in opposition to the motion for reconsideration, now identify parts of the record as evidence that the Commission was guided by these other Charter-mandated criteria. First, the reapportionment plan itself reflects the Commission's consideration of the "permanent and easily recognizable features" criterion, Charter § 3-17(f)(3), inasmuch as the written descriptions of each of the designated council districts refer to streams, shorelines, and other geographical features.

Second, at their final meeting on December 18, 2001, the commissioners made statements that evidence serious consideration of all four criteria. One commissioner related the Commission's task of balancing the equal representation criterion with the other three criteria:

> Since the Big Island population is not equally spread out geographically throughout the Island, obviously the districts cannot be geographically equal in size, in addition to being numerically equal. That is why

argument and controversy can result. Some people or groups want a council district which serves their interest in a particular geographical area or a plan which serves their particular or geographical or political interest. But these localized special interests don't give adequate consideration to the rest of the Island.

The Commission needs to consider all of the Island and all of its people in making the best plan. Such plans would spread around more fairly the benefits and detriments of equal numbers but on equal geography.

Another commissioner expressed the Commission's motivation to adopt a plan ensuring that, consistent with the provisions of Charter sections 3-17(f)(1) and (2), "[n]o district shall be drawn to unduly favor or penalize a person or political faction" and that districts would be "contiguous and compact":

I have no doubt in my mind that we did the very best we could with creating, you know, as compact and as contiguous districts as possible. . . .

So we did as a Charter mandate, we did the very best we could wherever possible to create a [sic] compact and contiguous districts as we could. We made concerted efforts to keep communities and subdivisions together. Again, here and there, there [sic] wasn't absolutely do-able because of the census tracts and numbers and all the other issues. But I have no doubt in my mind that we did our very, very best.

. . . .

I have no doubt in my mind that no specific group was penalized, and no specific group was favored, we did the very best we could, all of the Island and all the communities.

Pursuant to Riley, these statements, made by the Commission members themselves, justify the slightly greater than 10% deviation.[6] Accordingly, this court did not "overlook" or "misapprehend" the Riley holding.[7]

IV.

In their third point, Appellants argue that while the Commission's reliance on the total population base "reflects the underlying principle of the one man - one vote doctrine, it does not describe a rational state policy" inasmuch as it "allows an apportioning body to create legislative districts under which pre-existing districts (and the incumbents therein) are favored and [to] 'fracture' well-known communities of interests because of administrative convenience[.]"[8]

Appellants' motion attempts to clarify what was obviously ambiguous in their appellate briefs -- the possibly problematic effect of the redistricting plan on "communities of interest."[9] According to the motion, the redistricting plan allegedly "fractures" the "judicial" district of Puna:

> [T]he judicial district of Puna with 31,307 countable people is "fractured" by assigning portions of "upper" Puna along with portions of the adjoining judicial district of South Hilo to County Council District #3 and by assigning other portions of "upper" Puna along with all of the adjoining judicial district of Ka'u and portions of the non-adjoining, distant judicial district of South Kona to County Council District #6. As a result, residents of Puna have one resident councilor and must "share" two councilors with other adjoining districts who may or may not be a resident of Puna. This is a classic example of vote dilution of residents of one district in favor of residents of other districts.
>
> As a result, residents of the "upper" Puna, whose population may justify a single councilor of its own,

> find their interests submerged into the adjoining and distant judicial districts of South Hilo, Ka'u, and South Kona. More significantly, Council Districts #1, 2, 3, and 4 are denominated by "Hilo interests," with a statistically significant number of non-resident students (who should have been excluded) in the judicial district of South Hilo.

While this explanation may have raised a concern, Appellants withdrew these arguments in the January 6, 2003 stipulation to amend first amended complaint and for entry of judgment. The stipulation stated:

> Plaintiffs and Defendants herein stipulate to the amendment of the First Amended Complaint filed here on March 6, 2002 as follows:
>
> 1. Plaintiffs withdraw and delete Paragraphs 12.a to 12.f;
>
> 2. Plaintiffs withdraw and delete Paragraphs 12.j to 12.n.
>
> The effect of the deletions is to withdraw Plaintiffs' allegations that the County of Hawai'i 2001 Reapportionment Commission failed to use a "rational or objective methodology" (¶¶ 12.a to 12.f) and wrongfully submerged communities of interest into larger districts (¶¶ 12.j to 12.n) but not Plaintiffs' allegations as to the population base that the County of Hawai'i 2001 Reapportionment Commission used (¶¶ 12.g to 12.i and 12.o to 12.p).
>
> As a result, the Order for Summary Judgment entered herein on the population base that the County of Hawai'i 2001 Reapportionment Commission used disposes of all issues herein leaving no other issues left for decision.

Specifically, the stipulation withdrew, inter alia, the following allegations:

No Rational or Objective Methodology

12.e. When the public provided information and recommendations on the assignment of communities of interest to specific Council Districts that differed from the 1991 Council District boundaries and the Commission's fixed geographical "starting points," the Commission rejected the public's input and recommendations, continued to rely upon the existing 1991 Council District boundaries and its arbitrar[il]y fixed geographical "starting points" and justified its adoption of the 2001 Reapportionment Plan by using arbitrary and inconsistent criteria.

> 12.f. As a consequence, the Commission's 2001 Reapportionment Plan (1) keeps incumbents in Council Districts based on the 1991 Council District boundaries, despite changes in the population for the County of Hawai'i since 1991, (2) fractures existing communities of interest, and (3) dilutes the representative power of some communities of interest while inflating the representative power of other communities of interest.
>
> . . . .

Submergence of Communities of Interests into Larger Districts Where Different Socio-Economic Interests Predominate

> 12.j. For more than 100 years, governmental units in Hawai'i have used the traditional land districts of the Island of Hawai'i, now known as the judicial districts, to organize government agencies and to administer government programs. . . .
>
> 12.k. These traditional land districts, or judicial districts, are the Districts of North Hilo, South Hilo, Puna, Ka'u, South Kona, North Kona, South Kohala, North Kohala and Hamakuà[.]

12.l. Furthermore, distinct communities of interest have developed and exist within these traditional land districts, or judicial districts.

12.m. Although the reapportionment principles in Articl IV, Section 6 of the Hawai'i State Constitution state that a reapportioning body shall avoid "[w]here practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate," the Commission did not identify or consider the socio-economic interests of communities that could be determined from public sources available to the Commission on subjects such as education, employment and poverty levels, or the effect of including communities of differing socio-economic interest into designated Council Districts.

12.n. As a consequence, even though reasonable and practicable alternatives existed and even though the public had provided the Commission with background information on the differing socio-economic interest of communities, the Commission rejected such alternatives and information and, using its arbitrary geographical "starting points" and 1991 Council District boundaries, submerged communities of interest in certain areas into a larger district wherein substantially different socio-economic interest predominate. This consequence is reflected in the Commission's action that:

> (1) divided communities in the upper (or northern) portion of the Puna judicial district and assigned those divided communities to two (2) separate Council Districts where substantially different socio-economic interest predominate[.]

(Some emphases added and some in original.) As observed in the opinion, "[t]he effect of the parties' stipulation . . . was

'to withdraw Appellants' allegations that the . . . Commission failed to use a 'rational or objective methodology' . . . and wrongfully submerged communities of interest into larger districts but not Appellants' allegations as to the population base that the . . . Commission used." Slip op. at 5 n.3 (brackets omitted) (emphasis added).

Appellants' withdrawal of the argument that the redistricting plan submerges communities of interests into larger districts where different socio-economic interests predominate precludes a resurrection of that argument on appeal, especially on a motion for reconsideration. See Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 27 (1992) ("The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion."); Briggs v. Hotel Corp., 73 Haw. 276, 287 n.7, 831 P.2d 1335, 1342 n.7 (1992) ("We again remind litigants that a motion for reconsideration is not the time to relitigate old matters."). Hence the alleged "vote dilution" of Puna residents is not properly before this court, having been withdrawn by stipulation. This court, then, did not "overlook" the "fracturing" of the judicial district of Puna because it was not a part of the appeal.

As to Appellants' contention that "the only articulated reason found in the County Reapportionment Commission's records" was "administrative convenience," as discussed supra, it must be reiterated that (1) Commissioner Van Pernis's "motion to 'include all people,'" which was "put to a vote and carried, evidenc[ed] that the Commission was motivated by inclusiveness as opposed to a discriminatory purpose[,]" slip op. at 22, and (2) the opinion cites to three additional criteria for redistricting mandated by section 3-17(f) of the Charter required to be considered by the Commission. See id. at 23. Moreover, the "administrative

convenience" argument was not presented as a discernible legal argument in Appellants' briefs[10] and, hence, need not have been addressed. Norton v. Admin. Dir. of the Court, 80 Hawai`i 197, 200, 908 P.2d 545, 548 (1995) (disregarding a particular contention for lack of a "discernible argument in support of that position, in violation of Rule 28(b)(7) of the Hawai`i Rules of Appellate Procedure").

V.

In their fourth point, Appellants disagree with this court's statement that "Appellants do not argue, nor point to evidence in the record, that the Commission did not 'make an honest and good faith effort to construct districts . . . of equal population as is practicable[.]'" Slip op. at 24 (citation omitted). Appellants assert in the motion that the lack of good faith and honesty argument was "subsumed" in their assignment of error and incorrectly assert that they "argued in their Opening Brief[11] . . . [that the Commission] made no effort, even when informed of the risks that it was taking by using the wrong population base, [sic] the Commission proceeded anyway - because of administrative convenience, because it was too difficult and time-consuming to do otherwise."

The fact remains, however, that Appellants did not expressly make a "lack of good faith and honesty" argument. Moreover, even if this court were to accept Appellants' contention that such an argument was "subsumed" in its assignment of error, it would not alter this court's conclusion that "[w]hat remains is Appellants' conclusory statement that the 'Commission's records do not reflect any evidence that justifies the [C]ommission's action to adopt a [r]edistricting [p]lan that has deviations that exceed the ideal mean by more than 10%.'" Slip op. at 24. Indeed, as County Appellees observe, the Commission's inclusion of the deviation charts in the reapportionment plan is "indicative of the good faith effort of the Commission to

achieve equal representation by keeping the deviations at no more than five percent." (12) Hence, this point is without merit.

VI.

In their fifth argument, Appellants maintain that "[a]lthough this Court states that [Appellants] did not assert that the County Reapportionment Commission's plan is invalid, if the plan is constitutionally defective, the plan cannot be valid." But the opinion, in addition to pointing out that Appellants did not argue that the use of the wrong population base alone invalidated the Commission's plan, also observed that "[e]ven if Appellants had argued that the plan was void for being based on the wrong population, . . . the language of Charter section 3-17(f)(4) would bring us back to the constitutional question." Slip op. at 15. Accordingly, the opinion proceeds to address the question of whether, "when nonresident military personnel, their dependents, and university students are excluded from the population base, 'deviations emerge in the [r]edestricting [p]lan that exceed constitutional limits.'" Id. Thus, the opinion is in agreement with Appellants' contention that if the plan was constitutionally defective, it would be invalid. A majority of this court did "not believe that that [was] the case, however." Id. Such matters, then, were not "overlooked" or "misapprehended."

VII.

Finally, Appellants argue that "[i]n the usual case, this Court would remand the case to the trial court for further proceedings[,]" but because "the trial judge is no longer sitting and the County Reapportionment Commission has been dissolved[,] . . . this Court should simply reverse the trial court's judgment below[, and u]pon such reversal, the parties may then apply to this Court for further relief as the circumstances may warrant." In light of the disposition

herein, these matters need not be addressed, and in any event, appear irrelevant to the decision.

VIII.

Therefore, based on the foregoing,

IT IS HEREBY ORDERED that the motion for reconsideration is granted as to the request to strike the reference to the Jacobson testimony, and, therefore, the paragraph beginning on line 12 from the top of page 22 of the opinion shall be amended by striking the words after "Commission" on line 12 through line 20 and striking the word "then" on line 21, leaving the sentence beginning on line 12 to read:

For at the second meeting of the Commission, Commissioner Mark Van Pernis made a motion to "include all people": "[A]ll the people that the census counted is included because, whether they vote or not, or whether they're young or old, military or not, they all use county services, they all pay taxes in some form or shape and they all need representations."

The Clerk of the Court is directed to incorporate the foregoing changes in the original opinion and take all necessary steps to notify the publishing agencies of these changes.

IT IS FURTHER ORDERED that the motion is denied in all other respects.

Michael J. Matsukawa, on the motion for plaintiffs-appellants.

Patricia K. O'Toole,
Deputy Corporation Counsel, County of Hawai`i, for defendants-appellees.

1. Hawai`i Rules of Appellate Procedure Rule 40(b) (2005) provides that a motion for reconsideration "shall state with particularity the points of law or fact that the moving party

contends the court has overlooked or misapprehended, together with a brief argument on the points raised."

2. Appellants attach Jacobson's June 22, 2001 testimony to their motion as Appendix 31, but the testimony is already part of the record.

3. County Appellees attached excerpts from the December 18, 2001 transcripts to their memorandum in opposition to Appellants' motion for change of venue, but Jacobson's testimony on pages 9-13 was not included.

4. In their response to the motion, County Appellees maintain that Jacobson's testimony "was given at an earlier meeting of the Commission before any particular plan was before it. She later spoke in support of a particular plan but did not specifically address the population issue. What she was clearly recanting was the plan she herself submitted to the Commission to consider." To remove any doubt regarding this matter, however, we believe the better course is to excise such testimony.

5. The argument that the redistricting plan "fractures" the judicial district of Puna is addressed infra, Part IV.

6. Hence, as County Appellees maintain, "it would be a futile exercise to remand to ask commissioners for a reason which they have already expressed in the vote on the motion at the June 22, 2001 meeting."

7. Inasmuch as the reapportionment plan and the commissioners' testimony are part of the record, this court may rely on these grounds to affirm the court's judgment. See Delos Reyes v. Kuboyama, 76 Hawai`i 137, 140, 870 P.2d 1281, 1284 (1994) ("This court may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely on it.").

8. Appellants argue as follows:

> In offering its justification for the County Reapportionment Commission's plan (in

substitution of the Commission's omission), this Court states that the Commission's purpose must have been to use a total population base that would give every man, woman, child, incarcerated felon, soldier, dependent of a soldier, resident alien and others "representation."

While this statement reflects the underlying principle of the one man - one vote doctrine, it does not describe a rational state policy. Nor does it explain how that state policy is in fact legitimately advanced by a plan that is prima facie unconstitutional because it violates that one man - one vote doctrine of keeping populations as equal as possible to avoid the danger of diluting votes.

The extension of this statement is that the one man - one vote principle allows an apportioning body to create legislative districts under which pre-existing districts (and the incumbents therein) are favored and that "fracture" well-known communities of interests because of administrative convenience, the only articulated reason found in the County Reapportionment Commission's records. No court has ever subscribed to such a conclusion.

It should be noted that the opinion did not reference "every man, woman, child, incarcerated felon, soldier, dependent of a soldier, resident alien and others," as Appellants imply in the quote above. The opinion did not employ such a list. Indeed, Appellants stated as a point of error that "the 2001 County Reapportionment Commission should have used a population base that excluded nonresident military personnel and their dependents and nonresident students," groups which the opinion did discuss.

9. Appellants contend that "Table Two, reproduced in Opening Brief, Appendix 25, shows how the judicial district of Puna with 31,307 countable people is 'fractured.'" But Table Two, without explanation, does not convey the specific contention that Puna was "fractured." In fact, Appellants did not utilize Table Two for this proposition. Appellants referenced Table Two on three occasions in their opening brief. The first and second references, stating that "[t]he consequence of not excluding these persons from the population base is set forth in Table One and Table Two," and that "[t]he statistical significance of the 810 nonresidents who are located in the District of South Hilo is shown in Table Two," were cryptic at best. In the third reference, Appellants utilized Table Two to "show[] the number of persons who fall below or above the ideal mean for each council district," not to point out that Puna was being "fractured."

10. At the end of their reply brief, Appellants stated that "[c]onvenience, not substantive law, dictated the outcome of the final Redistricting Plan." This statement did not establish that the Commission was guided by administrative convenience in creating legislative districts. Again, Appellants did not assert that the Commission failed to consider the other valid criteria as mandated under the Charter. As the opinion observes, "related objections were apparently waived when Appellants stipulated to withdraw the claims that the Commission failed to use a 'rational or objective methodology' and 'wrongfully submerged communities of interest into larger districts,' . . . thereby abandoning any claim that the Commission incorrectly applied the other three criteria in Charter section 3-17(f)." Slip op. at 23-24.

11. The term "convenience" first appeared in the reply brief, not the opening brief as Appellants state, and it does not appear Appellants used the term "administrative convenience." See supra note 10.

12. Using the total population base, the deviation percentage of each district does not exceed 5% and, therefore, does not exceed the 10% threshold.

FOR PUBLICATION

DISSENTING OPINION BY NAKAYAMA, J., IN WHICH MOON, C.J., JOINS

I write to emphasize that, in contrast to the majority's opinion, Riley v. Baxter County Election Commission, 843 S.W.2d 831 (Ark. 1992), in no way supports the conclusion that the 2001 County of Hawai'i Reapportionment Commission (Commission) followed a "rational" redistricting policy that justifies what is otherwise an unconstitutional redistricting plan.

Riley is clearly distinguishable. At issue in that case was a county redistricting plan drawn by the election commission of Baxter County, Arkansas. Having relied on an accurate population count, the commission was aware that its plan, which exhibited a total population deviation of 10.149 percent, was presumptively unconstitutional. Id. at 832.

When the plan's constitutionality was subsequently challenged, commission members stepped forward to justify the heightened population deviation. Testimony from those members indicated that, while endorsing the "overriding principle . . . [of] equal representation," the commission also believed that the plan should "keep to the old district lines as much as possible to avoid inconveniencing the voters." Id. at 833. The rational policy of "voter convenience," proffered by the commission in formal testimony, thus justified the plan's incremental erosion of equal representation. Id.

Riley accordingly stands for the far from novel proposition that, where a redistricting plan's total population deviation exceeds 10 percent, the redistricting authority must step forward and articulate some rational justification for the deviation. See Voinovich v. Quilter, 507 U.S. 146, 161 (1993). Riley does not address the far different factual situation at issue here, where a redistricting authority, in mistaken reliance on an inaccurate population count, formulates a redistricting plan that was never intended to be presumptively unconstitutional. Neither Riley, nor for that matter, any of the other cases cited by the majority, endorses the majority's contention that a presumptively unconstitutional redistricting plan may be "rationalized" when the redistricting authority, due to an unrealized computational error, inadvertently devises a plan that exhibits a total population deviation in excess of 10 percent.

The dearth of authority supporting that contention is unsurprising. The fourteenth amendment to the United States Constitution generally requires that a reapportionment plan's total population deviation be less than 10 percent to pass constitutional muster. Brown v. Thomson, 462 U.S. 835, 842-843 (1983). Nonetheless, because "[m]athematical exactness or precision is hardly a workable constitutional requirement," Reynolds v. Sims, 377 U.S. 533, 577 (1964), the fourteenth amendment tolerates a limited degree of divergence "from a strict population standard," provided that the plan as a whole is "based on legitimate considerations incident to the effectuation of a rational state policy." Id. at 579. In other words, countervailing state interests may, at times, permit a less than numerically equal redistricting plan, and a reapportionment authority is not necessarily remiss in pursuing those interests at the expense of perfect numerical equality among the voting districts.

The foregoing framework for assessing the constitutionality of a redistricting plan pragmatically acknowledges that

government must, in certain circumstances, be allowed to pursue redistricting policies that incidentally enhance the representational power of some members of the electorate at the expense of others. It was never intended to function as a curative device for excusing, after the fact, a reapportionment authority's gross computational errors or inadvertent methodological mistakes -- especially where, as here, those missteps were solely responsible for tainting the redistricting plan with the presumption of unconstitutionality.

The right of equal representation is far too hard-won a liberty for its erosion to be justified so blithely. Accordingly, I must dissent.

A 22

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR, Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI`I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 02-1-0092)

ORDER OF CORRECTION
(By: Acoba, J.)

Upon review of the opinion of the court filed in this case on July 22, 2005, it appears that the civil number reflected on

page 1 of the opinion, Civ. No. 01-1-0092, is incorrect. Therefore,

IT IS HEREBY ORDERED that the civil number is corrected to read: Civ. No. 02-1-0092.

IT IS FURTHER ORDERED that the clerk of the court is directed to incorporate the foregoing change in the original opinion and take all necessary steps to notify the publishing agencies of this change.

DATED: Honolulu, Hawai`i, July 28, 2005.

A 24
*****FOR PUBLICATION*****

IN THE SUPREME COURT
OF THE STATE OF HAWAI`I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT,
a Hawai`i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST;
RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR,
Plaintiffs-Appellees

vs.

COUNTY OF HAWAI`I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD
VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI`I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

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NO. 25614

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 01-1-0092)

JULY 22, 2005

LEVINSON, ACOBA, AND DUFFY, JJ.;
WITH NAKAYAMA, J., CONCURRING SEPARATELY AND
DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that (1) the phrase "equal resident populations" in section 3-17(f)(4) of the Charter of the County of Hawai`i (the Charter) excludes nonresident college students and nonresident military personnel and their dependents from the population base for purposes of reapportioning county council districts of the County of Hawai`i, (2) a total deviation in excess of 10% in an electoral reapportionment plan presents a prima facie case of discrimination in violation of the equal protection clause of the United States Constitution, (3) a rational government policy will justify a total deviation that slightly exceeds the 10% threshold, and (4) assuming, in excluding nonresident students and nonresident military personnel and their dependents from the population base, the plan of the County of Hawai`i 2001 Reapportionment Commission (the Commission) resulted in a total deviation of 10.89%, such a deviation in this unique instance (a) was minimal, (b) apparently included the Commission's consideration of other valid criteria under section 3-17 of the Charter, (c) resulted from the commission's intent to achieve inclusiveness and equal representation, and (d) was, therefore, constitutional.

I.

Pursuant to the Charter, Defendant-Appellee County of Hawai`i initiated a reapportionment of its county council districts in 2001. The Commission was appointed and confirmed in accordance with a provision in the Charter requiring that in 1991, and every tenth year thereafter, a commission be established to determine the boundaries of council districts, and to file a reapportionment plan by December 31 of those years.[1] A series of public meetings and hearings was held throughout Hawai`i County, during which private speakers argued that the Commission was using the wrong population base and should exclude there

from nonresident college students and nonresident military personnel and their dependents. The Commission adopted a reapportionment plan (the Commission's plan) and filed it as required with the County Clerk. The Commission's plan provided for a total resident population base that included nonresident college students and nonresident military personnel and their dependents.

Subsequent to the filing of the Commission's plan, Plaintiffs-Appellants Citizens for Equitable and Responsible Government, Brenda J. Ford, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, Ronald C. Phillips, (collectively, Appellants) and Plaintiffs-Appellees Beverly Byouk and Sandra W. Scarr filed a Complaint and First Amended Complaint against County of Hawai`i and other Defendants-Appellees, the County Clerk, Hawai`i County and Llyod Van De Car, Chairman of the Commission (collectively, County Appellees) in the third circuit court (the court) [2] requesting, inter alia, a declaratory ruling that the Commission's plan was invalid.

Appellants moved for partial summary judgment on the ground the Commission used the wrong population base and that, therefore, the Commission's plan was unconstitutional because its total deviation from the ideal mean exceeded 10%. Appellants appended to their motion for summary judgment a letter dated October 25, 1989, written by Christopher J. Yuen (Yuen), the attorney representing the Commission during the drafting of the reapportionment plan, for the proposition that the Commission was advised to use the same population base as used by the State Reapportionment Commission. On June 20, 2002, County Appellees filed an affidavit by Yuen to rebut Appellants' proposition. Appellants moved to strike the affidavit.

Following a hearing, the court denied Appellants' motion and sua sponte granted partial summary judgment in favor

of County Appellees. The court did not issue findings of fact or conclusions of law, but in its July 19, 2002 order stated, inter alia, as follows:

> The [c]ourt finds that the adoption by the . . . Commission of a resident population base which did not exclude non-resident military personnel and their dependents and did not exclude non-resident university students in the 2001 council redistricting plan was proper.
>
> The [c]ourt also finds that there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission.

Following the court's ruling, the parties agreed to withdraw all remaining counts so that final judgment could be entered in the case.[3] The court entered final judgment in favor of County Appellees and against Appellants on January 24, 2003. Appellants filed their notice of appeal on January 31, 2003.

II.

On appeal, Appellants maintain that the court erred in (1) refusing to strike the affidavit of the Commission's counsel, (2) concluding that the Commission could include nonresident university students and nonresident military personnel and their dependents in the population base, (3) deciding that the total deviation between county council districts in the redistricting plan did not exceed constitutional limits, and (4) ruling that the redistricting plan is valid. They request an order (1) invalidating the Commission's plan, (2) appointing a master to prepare a new redistricting plan using the correct population base, and (3) granting such other appropriate relief.

III.

"Unlike other appellate matters, in reviewing summary judgment decisions[,] an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied. Beamer v. Nishiki, 66 Haw. 572, 577, 670 P.2d 1264, 1270 (1983). "Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Pac. Int'l Serv. Corp. v. Hurip, 76 Hawai`i 209, 213, 873 P.2d 88, 92 (1994). A trial court's conclusions of law are reviewed de novo under the right/wrong standard. Fujimoto v. Au, 95 Hawai`i 116, 137, 19 P.3d 669, 720 (2001). Under this standard, the trial court's conclusions of law are not binding upon the appellate court and are freely reviewable for its correctness. Id.

IV.

As to point (1), the court did not rule on Appellants' request to strike an affidavit of the Commission's attorney. Appellants assert that the affidavit of the Commission's attorney is not part of the Commission's records and contains the opinion and recollection of the attorney ten years after-the-fact. County Appellees maintain that they offered the affidavit of the Commission's attorney to clarify that the letter in Appellants' motion stated only that there was a difference in reapportionment between using residents, as opposed to registered voters, in determining the population base and that the affidavit was not introduced to reflect the intent of the charter commission.[4] Inasmuch as the affidavit was not offered with respect to the intent of the charter commission and is not necessary to our interpretation of the phrase "resident populations," see infra, we do not address Appellants' point (1)..

V.

The primary issue on appeal, Appellants' point (2), is whether nonresident college students and nonresident military personnel and their dependents should be excluded from the population base of Hawai`i County's reapportionment of city council districts. The Charter mandates that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions[,]" Charter § 3-17(f)(4) (emphasis added), see supra note 1, but fails to define the phrase "resident populations."

Appellants first argue that "resident populations" should be interpreted in the same manner as that term is applied in the apportionment of state representative districts, that is, by using a permanent resident population base. Appellants refer to an amendment made to Article IV of the Constitution of the State of Hawai`i in 1992, when voters statewide voted to use a "permanent resident" population base for apportioning legislative districts. The amendment mandated that only residents having their domiciliary in the State of Hawai`i may be counted in the population base for the purpose of reapportioning legislative districts. Article IV of the Constitution of the State of Hawai`i states in relevant part as follows:

> The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units namely: (1) the island of Hawai'i, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (2) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions; except

> that no basic island unit shall receive less than one member in each house.

Haw. Const. art. IV, § 4 (amended 1992) (emphasis added). However, the amendment to Article IV only applies to state legislative redistricting, not county council redistricting.

The Commission interpreted the Charter phrase "resident populations" to encompass all persons who "reside within the county" as reflected in the federal census and, accordingly, did not exclude nonresident university students and nonresident military personnel and their dependents in the population base for the reapportionment plans. County Appellees argue that the Commission's interpretation of the phrase was a discretionary act, and, thus, under Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (1994), the actions of the Commission should be accepted unless an abuse of discretion is shown.

"The interpretation of the charter is similar to the interpretation of a statute." Maui County Council v. Thompson, 84 Hawai`i 105, 106, 929 P.2d 1355, 1356 (1996). When interpreting a statute,

> our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

Id. (quoting State v. Baron, 80 Hawai`i 107, 113, 905 P.2d 613, 619 (1995) (emphasis added). In this regard, a common definition of "resident" is

> [a]ny person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his

> presence within the State is something other than merely transitory in nature.

Black's Law Dictionary 1309 (6th ed. 1990) (emphases added). See In re Irving, 13 Haw. 22, 24 (1900) ("[T]he primary significance of the word 'residence' as used in the constitution is the same as domicil[e] -- a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights." (Quoting Chase v. Miller, 41 Pa. 403, 420 (Pa. 1862))). This definition of "resident" would exclude any person who did not exhibit a present intent to remain within Hawai`i County for more than a transitory period.

Generally, college students from outside Hawai`i County who lack a present intent to remain in the county for a period of time beyond their date of graduation would not be considered residents. Their presence in Hawai`i County is primarily for educational purposes, which is "transitory in nature." Likewise, ordinarily the transitory nature of military personnel from outside Hawai'i County is apparent. Normally, military personnel and their dependents are temporarily stationed in the county by the United States military. Military personnel may have little say in deciding the location of their assignment. As a result, generally speaking, members of the military are in Hawai`i County involuntarily, as opposed to persons who choose to live in the county. See Carpenter v. Hammond, 667 P.2d 1204, 1211 (Alaska 1983) (recognizing the "involuntary nature of the military member's assignment to [a] state").

The Charter employs the phrase "resident populations" which indicates that the drafters of the Charter intended to limit the population base to residents of Hawai`i County. Those who live in the county temporarily for educational purposes or those who live in the county involuntarily because ordered to do so would seemingly lack a present intent to remain in the county, rendering their stay

"transitory in nature."[5] Logically, the drafters of the Charter would not have modified the word "population" by the adjective "resident" or, on the other hand, would have employed the phrase "total population" had they intended to include nonresident college students and nonresident military personnel and their dependents in the population base.

Accordingly, we hold that the phrase "resident populations" found in the Charter excludes nonresident university students and nonresident military personnel and their dependents from the population base of the county council reapportionment plan. The court, therefore, was wrong to conclude that the Commission's inclusion of these nonresidents was proper.[6]

VI.

While we must interpret the term "resident populations," we note that no dispute is raised by the parties as to whether the persons designated as residents or nonresidents were properly denominated as such. Appellants note that "in 2001, State officials had access to an improved database and software program and had the ability to collect data that enabled state officials to identify and locate nonresident students, nonresident military personnel and nonresident military dependents with reasonable accuracy." (Emphases omitted.) Thus, argue Appellants, "[i]t was also possible to identify these same individuals for the purpose of establishing county council seats for the County of Hawai`i County Council."

County Appellees do not deny the availability of such technology nor challenge its feasibility. In fact, they apparently relied on the State's database and computer program to support their motion for partial summary judgment. In an affidavit attached as "Exhibit D" to County Appellees' motion for partial summary judgment, David J. Rosenbrock, data processing coordinator for the State of

Hawai`i Office of Elections, stated that "his office provided population data to the County of Hawai`i Reapportionment Commission," derived from "the federal census, the United States Military and from the University of Hawai`i at Hilo." Attached as "Exhibit 1" to the affidavit were three charts showing (1) total population with no extractions, (2) total population with nonresident students and nonresident military personnel extracted, and (3) total population with nonresident students, nonresident military personnel and their dependents extracted. The third chart expressed a deviation of 10.893%. The difference in population bases between the first chart, showing a total population of 148,677, and the third chart, showing a total population minus nonresidents of 147,806, confirms Appellants' calculation in their opening brief that using information from the Commission's computer database, 871 "nonresidents . . . should have been excluded from the population base." County Appellees do not raise any objection to this.

VII.

We observe further that the exclusion of identifiable nonresidents from the population base is consistent with the rules for determining "residency" for election purposes under Hawai'i's state election law, Hawai`i Revised Statutes (HRS) chapter 11. HRS chapter 11 governs "all elections, primary, special primary, general, special general, special, or county." HRS § 11-3 (1993) (emphasis added). Pursuant to HRS § 11-11 (1993), the "county clerk shall be responsible for voter registration in the respective counties and the keeping of the general register and precinct lists within the county." HRS § 11-13 (1993) provides seven rules for determining a person's "residency" for voter registration purposes. The statute references students as well as military personnel as follows:

> (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
>
> (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in this State[.]

HRS § 11-13. The Commission, by relying on "the census-counted population," included persons in the population base "solely by reason of the person's presence" in Hawai`i County "while employed in the service" or "while a student of an institution of learning[.]" This counting of students and military personnel and their dependents based on mere presence alone conflicted with the statutorily mandated process for determining who may register to vote among the counties. The plain reading of "resident populations" avoids the anomalous result of counting nonresidents in the reapportionment plan when those nonresidents, pursuant to HRS § 11-13, cannot register to vote.

VIII.

A.

In line with our holding, the Commission should have excluded the said nonresidents from the redistricting population base. However, Appellants do not argue that the use of the wrong population base alone invalidates the Commission's plan, but, rather, that the use of the wrong population base created an unconstitutional deviation. Even if Appellants had argued that the plan was void for being based on the wrong population, we observe that the language of Charter section 3-17(f)(4) would bring us back to the constitutional question. Section 3-17(f)(4) states that "[d]istricts shall have approximately equal resident

populations as required by applicable constitutional provisions." (Emphases added.) Thus, assuming Appellants' calculations, infra, are correct, we address Appellants' argument in points (3) and (4) that when nonresident military personnel, their dependents, and university students are excluded from the population base, "deviations emerge in the [r]edistricting [p]lan that exceed constitutional limits." We do not believe that that is the case, however.

B.

The United States Supreme Court has held that the equal protection clause of the United States Constitution requires that electoral representation "be apportioned on a population basis." Reynolds v. Sims, 377 U.S. 533, 568 (1964). [7] This requirement means "that a [s]tate [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." Kawamoto, 75 Haw. at 470, 868 P.2d at 1187 (quoting Reynolds, 377 U.S. at 577 (emphases added)). The Court recognized, however, that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Reynolds, 377 U.S. at 533. See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189. Accordingly, it adopted a flexible, "case-by-case" approach to assessing redistricting plans, providing "general considerations" as follows:

> A [s]tate may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designating a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one [s]tate, while another [s]tate might desire to achieve some

> flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the [s]tate.
>
> . . . .
>
> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Reynolds, 377 U.S. at 578-79 (emphases added). See Swann v. Adams, 385 U.S. 440, 443-44 (1967) (reversing a decision upholding a reapportionment plan where the state failed to present, and the district court failed to articulate, "acceptable reasons for the variations" of 30% among senate districts and 40% among house districts).

The "general principle of population equality . . . applies to state and local elections[.]" Abate v. Mundt, 403 U.S. 182, 185 (1971). The Supreme Court has intimated that "slightly greater percentage deviations may be tolerable for local government apportionment schemes" and that "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality." Id. See id. at 186-88 (upholding a county reapportionment plan with a total deviation of 11.9% and districts that exactly correspond to the county's five towns "based on the long tradition of overlapping functions and dual personnel" in the county government and "on the fact that the plan . . . [did] not contain a built-in bias tending to favor particular political interests or geographic areas").

> In view of these considerations, . . . minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. [Supreme Court] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate. Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted). See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189.

At issue in Brown was a Wyoming reapportionment plan that allocated one of sixty-four seats in the state's house of representatives to a county with a deviation of 60% below the mean. Id. at 837, 843. Nevertheless, the Supreme Court upheld the plan on the following bases: (1) it was "undisputed" that Wyoming's policy of ensuring that each county had one representative was "free from any taint of arbitrariness or discrimination"; (2) "population equality [was] the sole other criterion used"; and (3) "there [was] no built-in bias tending to favor particular political interests or geographic areas." Id. at 843-44. The Brown majority approved of the Wyoming plan as "an unusually strong example of an apportionment plan the population variations of which [were] entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." [(8)] Id. at 844. Thus, the "ultimate inquiry" is to determine "whether the legislature's plan may reasonably be said to advance a rational state policy and, if so, whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."

Id. at 843 (internal quotation marks, brackets, and citation omitted) (emphasis added).

IX.

A.

The Commission's plan divides Hawai`i County into nine districts. Using the "resident population" base (excluding nonresident military personnel, their dependents, and university students) of 147,806, propounded by Appellants, the ideal mean is 16,423 (147,806 divided by nine). According to Appellants' briefs and the record, the difference between the ideal mean and the actual "resident population" of each district represents that district's "deviation," which is translated into a deviation percentage. The difference between the district with the resident population that exceeded the ideal mean by the greatest percentage and the district with the resident population that fell below the ideal mean by the greatest percentage constitutes the redistricting plan's "total deviation." According to Appellants' calculations, the resident population of District 2 was 6.20% below the ideal mean (the latter category) and the resident population of District 8 was 4.69% above the ideal mean (the former category), thereby resulting in a total deviation of 10.89%.[9] County Appellees do not concede that there is such a deviation, maintaining that "[a]ny deviation is the result of the artificial construct of the Appellants in determining that the numbers they believe should have been used are the only correct numbers, when it was clearly within the discretion of the [C]ommission to use the numbers which it did use."[10]

However, as stated supra, to support their motion for partial summary judgment, County Appellees submitted the Rosenbrock affidavit, which arrives at the same 10.89% figure as the total deviation when nonresident students and nonresident military and their dependents are excluded from the total population.

B.

Using Appellants' deviation figure for our analysis, a total deviation of 10.89% exceeds the Supreme Court's threshold and, therefore, creates a prima facie case of discrimination in violation of the equal protection clause. The Supreme Court of Arkansas has addressed a county plan with a total deviation similar to the deviation of the Commission's plan here. In Riley v. Baxter County Election, 843 S.W.2d 831, 832-33 (Ark. 1992), all parties stipulated that the Baxter County redistricting plan varied among the districts by 10.149%. In assessing whether a "rational policy to justify a variance over 10%" existed, id. at 833, the Arkansas Supreme Court acknowledged the "systematic approach" taken by the election commission. The commission had divided "the total population" of Baxter County by eleven, the number of districts to be apportioned.

"The districts with population already closest to that number were kept the same, and the others were slightly modified, taking geography into account, to reach parity." Id. At the hearing before the trial court, a commission member testified that "the overriding principle" followed by the commission in redistricting "was equal representation." Id. The Arkansas Supreme Court concluded that the commission's "systematic approach . . . reveal[ed] a rational policy of redistricting in Baxter County" and that "the 10.149% variance [was] only slightly over the acceptable 10% variation." Id. Thus, it was held that the trial court did not err in finding that the commission overcame the prima facie case of discrimination. Id.

Similarly here, the 10.89% total deviation of the Commission's plan is "only slightly over the acceptable 10% variation." Id. It is true, as Appellants posit, that the Commission did not address the deviation question because it was working from the "total" as opposed to "resident" population base, which h presented only an 8.62%

deviation. However, we cannot say that no rational basis underlay the 10.89% deviation because, akin to the approach exemplified by the commission member's testimony in Riley, the Commission in the instant case, by using "total" population, evidenced an intent to achieve inclusiveness and equal representation. Cf. Calderon v. Los Angeles, 481 P.2d 489, 493 (Cal. 1971) ("Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." (Emphasis added.)).

For at the second meeting of the Commission, Hawai`i County Councilmember Julie Jacobson testified in favor of "using the population as the basis for the districting," stating that,

> each human being has needs for the government serves [sic] and it doesn't matter if you're one day old, if you're 99 years old, if you vote or don't vote, or any other of those variables . . . each person needs to be considered and I think especially with the complexity of infrastructure issues, that we deal with, that's why it's important.

Commissioner Mark Van Pernis then made a motion to "include all people": "[A]ll the people that the census counted is included because, whether they vote or not, or whether they're young or old, or military or not, they all use county services, they all pay taxes in some form or shape and they all need representations." The motion was put to a vote and carried, evidencing that the Commission was motivated by inclusiveness as opposed to a discriminatory purpose.

Importantly, the Charter required the Commission to consider three additional factors in redistricting. In addition to the "approximately equal resident populations"

requirement at issue here, Charter section 3-17(f) required the Commission to consider the following criteria:

> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
>
> (2) Insofar as possible, districts should be contiguous and compact;
>
> (3) District lines shall, where possible, follow permanent and easily recognizable features; . . . .

These considerations governed the Commission's determination. The statements supra at the second meeting of the Commission evidenced the Commission's commitment against favoring or penalizing a person or political faction in consonance with Charter Section 3-17(f)(1).

Ultimately, the deviation stemming from a "pure population" standard resulted from the Commission's commitment to an inclusive model rather a discriminatory one. Appellants do not contend that the Commission failed to consider other redistricting criteria under the Charter or that such criteria would not support a slightly greater deviation than the 10% prima facie threshold. It should be noted that related objections were apparently waived when Appellants stipulated to withdraw the claims that the Commission failed to use a "rational or objective methodology" and "wrongfully submerged communities of interest into larger districts," see supra note 3, thereby abandoning any claim that the Commission incorrectly applied the other three criteria in Charter section 3-17(f).

Finally, we observe that Appellants do not argue, nor point to evidence in the record, that the Commission did not "make an honest and good faith effort to construct districts . . . of equal population as is practicable[,]" Reynolds, 377 U.S. at 577, that the plan has "'a built-in bias tending to favor particular political interests or geographic areas[,]'" Brown,

462 U.S. at 844 (quoting Abate, 403 U.S. at 187), or that the Commission's redistricting process was "taint[ed]" with "arbitrariness," id. at 843. What remains is Appellants' conclusory statement that the "Commission's records do not reflect any evidence that justifies the [C]ommission's action to adopt a [r]edistricting [p]lan that has deviations that exceed the ideal mean by more than 10%." Therefore, on the foregoing bases and under the specific circumstances of this case, we hold that, ultimately, the court did not err in concluding that "there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission "

X.

Based on the foregoing, the Commission's erroneous inclusion of nonresident students and military personnel and their dependents in the population base for reapportionment of Hawai`i County council districts did not ultimately result in an unconstitutional deviation under its reapportionment plan. Although we do not agree with the court that the Commission's population base was correct, we affirm the court's decision upholding the Commission's plan because the plan complies with the mandate of Charter section 3-17(f)(4) that the districts be comprised of "approximately equal resident populations as required by applicable constitutional provisions." (Emphases added.) See Hawai'i Provider's Network, Inc. v. AIG Hawai'i Ins. Co., 105 Hawai`i 362, 368 n.14, 98 P.3d 233, 239 n.14 (2004) ("[W]here the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave the wrong reason for its action." (Quoting Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983).)); Poe v. Hawai`i Labor Relations Bd., 87 Hawai`i 191, 197, 953 P.2d 569, 575 (1998) ("Where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." (Quotation marks and

citation omitted.)). Accordingly, the court's January 24, 2003 final judgment is affirmed.

On the briefs:
Michael J. Matsukawa for
for plaintiffs-appellants.

Patricia K. O'Toole,
Deputy Corporation Counsel,
County of Hawai`i, for
defendants-appellees.

1. Section 3-17 of the Charter under which the Commission acted states as follows:

(a) There shall be a county reapportionment commission which shall establish the boundaries of the council districts.(b) The initial reapportionment commission shall consist of seven members, two of whom shall be residents of the combined judicial districts of North and South Hilo, one from the judicial district of Puna, one from the judicial district of Kau, one from the combined judicial districts of North and South Kona, one from the combined judicial districts of North and South Kohala, and one from the judicial district of Hamakua. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

> (c) Each subsequent reapportionment commission shall consist of nine members. One member shall be a resident of each council district as established by the previous reapportionment commission. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(d) The year 1991 and every tenth year thereafter shall be reapportionment years. The reapportionment commission shall be appointed and confirmed by March 1 of the reapportionment year, and shall file a reapportionment plan with the county clerk by December 31 of the reapportionment year.

(e) The county clerk shall furnish all necessary technical and secretarial services for the reapportionment commission. The council shall appropriate necessary funds to enable the commission to carry out its duties.

(f) The reapportionment commission shall be guided by the following criteria in establishing the boundaries of the council districts:

(1) No district shall be drawn to unduly favor or penalize a person or political faction;

(2) Insofar as possible, districts should be contiguous and compact;

(3) District lines shall, where possible, follow permanent and easily recognizable features;

(4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

(g) The district boundaries as established by the reapportionment commission shall be in effect at the first regularly scheduled council election following the filing of the plan and for any subsequent council election. The district boundaries in effect prior to the filing of the reapportionment plan shall remain in effect

> during the duration of the term of all councilmembers elected or appointed to represent such districts until the expiration of the full term of such councilmembers, including any election held to fill an unexpired term under section 3-4.

Charter of the County of Hawai'i § 3-17 (1990)

2. The Honorable Riki May Amano presided.

3. The effect of the parties' stipulation to amend the first amended complaint and for entry of judgment, was "to withdraw [Appellants'] allegations that the . . . Commission failed to use a 'rational or objective methodology'. . . and wrongfully submerged communities of interest into larger districts but not [Appellants'] allegations as to the population base that the . . . Commission used."

4. Yuen's affidavit states that "in drafting the charter language which provides that districts should have 'approximately equal resident populations as required by applicable constitutional provision' the intent was that the degree of equality only be as constitutionally mandated." (Emphasis added.) This reference to the charter commission's "intent" merely confirms what is stated in the criteria in Charter section 3-17(f).

5. Obviously, a person who otherwise ostensibly falls within such categories but establishes a present intent to remain in the county and exhibits indicia that his or her presence is something other than merely transitory may establish resident status. See Black's Law Dictionary at 1309.

6. Inasmuch as we determine the phrase "resident populations" to be plain and unambiguous, we need not examine the 1990 charter commission's records to ascertain the county electors' intent in adopting the phrase. In any event, Appellants maintain that aside from evidence that the charter commission "clearly rejected the use of 'registered

voters' as a base because that provision was already under [legal] attack[,] . . .[t]he rest of the charter commission's records is silent." County Appellees do not cite to the charter commission's records to support the Commission's interpretation. Hence, there is no instructive "legislative" history concerning the term "resident populations."

7. Reynolds is the "seminal decision in defining the 'one man, one vote' doctrine[.]" Calderon v. Los Angeles, 481 P.2d 489, 491 (Cal.1971).

8. The Brown majority noted that the appellants "limited their challenge to the alleged dilution of their voting power resulting from the one representative given to" the subject county and, therefore, the issue was "not whether a 16% average deviation and an 89% maximum deviation . . . [was] constitutionally permissible." 462 U.S. at 846. Hence, the Brown majority believed it was "not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifie[d] the population deviations," id., which is the second prong of the two-part "ultimate inquiry" -- whether the population disparities among the districts exceed constitutional limits. However, Justice Brennan, authoring the dissenting opinion in Brown, in which three justices joined, agreed that "Wyoming's long-standing policy of using counties as the basic units of representation [was] a rational one," but maintained that the deviations in Wyoming's plan, 'even if justified by state policy, [were not] within the constitutionally tolerable range of size." Id. at 853 (Brennan, J., dissenting, joined by White, Marshall, and Blackmun, JJ.).

9. In their opening brief, Appellants list the nine "Land Districts" as "North Hilo, South Hilo, Puna, Kau, South Kona, North Kona, South Kohala, North Kohala, and Hamakua." They calculate the differences between total population and total population less nonresidents as follows: -11 in North Hilo, -810 in South Hilo, -28 in Puna, -6

in Kau, -6 in South Kona, -5 in North Kona, -5 in South Kohala, and no change in North Kohala and Hamakua.

Appellants also contend that "the 'permanent residents' population base for State legislative districts on the island is 147,806 persons . . . and the 'resident populations' base for county council districts on the island is 148,677 . . . , a difference of 871 persons." (Emphases in original.) They argue that "871 is a statistically significant number in this case because most of these individuals reside in a single council district."

In contrast, County Appellees point out the following:

For [D]istrict 8, the .286% above 5% is equivalent to about 47 persons. For [D]istrict 2, the difference of .607% above 5% is equivalent to 100 persons. Thus, even if Appellants' population base were accepted as the only required base, the presumption of constitutionality could be achieved by shifting this small number of persons -- less than 200 persons in a population of over 147,000.

10. Using County Appellees' "total" population base, the deviation between District 6, with the lowest population, and District 9, with the highest population, is 8.62%.

CONCURRING AND DISSENTING OPINION BY
NAKAYAMA, J.
IN WHICH MOON, C.J., JOINS

I respectfully dissent from the majority's holding that the reapportionment plan for the County of Hawai`i (County), as crafted by the 2001 County of Hawai`i Reapportionment Commission (Commission), presents no equal protection violation.

As the majority notes, a reapportionment plan that exhibits a total population deviation of more than ten percent presumptively violates the right to equal representation secured under the fourteenth amendment to the United States Constitution. Brown v. Thomson, 462 U.S. 835, 842-843 (1983) (citing Swann v. Adams, 385 U.S. 440, 444 (1967)). That presumption of illegality may only be dispelled by showing that rational public policies outweigh the ill effects of an apportionment scheme that materially enhances the representational power of some at the expense of others. Mahan v. Howell, 410 U.S. 315, 326 (1973).

The Commission's reapportionment plan in this case is presumptively unconstitutional under Brown v. Thomson because it reflects a total population deviation of 10.89 percent. The excessive deviation was caused by the Commission's error in counting non-resident students and military personnel when calculating the ideal mean population for each of the voter districts.

I part company with the majority because the heightened deviation flowing from that error cannot, as Mahan v. Howell requires, be rationalized under any public policy the Commission was authorized to pursue. Section 3-17(f) of the Hawai`i County Charter (Charter) -- which enumerates the

only public policies the Commission may validly consider in fashioning district boundaries -- states:

> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
>
> (2) Insofar as possible, districts should be contiguous and compact;
>
> (3) District lines shall, where possible, follow permanent and easily recognizable features;
>
> (4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

Charter of the County of Hawai`i § 3-17(f) (1990). Inasmuch as subsection (4), under our interpretation today, forbids the inclusion of non-resident students and military personnel in the "resident population" count, the Charter's stated policy is to exclude these groups from the Commission's redistricting calculus. To allow the Commission to surreptitiously establish the district boundaries based on where these excluded groups reside -- in short, to employ, de facto, a "total population" count such as that used in this case -- undermines subsection (4)'s fundamental purpose of equalizing the populations among the districts without regard to non-resident students and military personnel.

Because no authorized public policy justifies the erosion of equal representation that the current plan engenders, the plan fails the constitutional test set forth in Brown v. Thomson and Mahan v. Howell. Accordingly, I must dissent.[1]

1. The County notes that the reapportionment plan's total deviation figure could be brought below ten percent by shifting "less than 200 persons" to other districts. That remedy would seem the better course than the majority's proposal to hold in place a reapportionment plan that is based on an inaccurate population count.

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Attorney for Plaintiffs

2003 JAN 24
PM 3:27
S/B. McRAE,
CLERK
THIRD CIRCUIT
COURT
STATE OF
HAWAI'I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai'i nonprofit corporation; BRENDA J. FORD, SANDRA W. SCARR; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS; BEVERLY A. BYQUK, Plaintiffs, vs. COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Defendants.	CIVIL NO. 02-1-0092 (HILO) FINAL JUDGMENT

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FINAL JUDGMENT

Judgment is hereby entered in favor of Defendants County of Hawai'i; County Clerk, County of Hawai'i, and Lloyd Van de Car, Chairman, County of Hawai'i 2001 Reapportionment Commission and against Plaintiffs Citizens for Equitable and Responsible Government, Brenda J. Ford, Sandra W. Scarr, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, Ronald C. Phillips, and Beverly Byouk.

Pursuant to the Stipulation entered on January 6, 2003, there are no other issues or claims left for disposition.

DATED: Hilo, Hawai'i, Jan 24, 2003.

s/ Riki Amano
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

s/Patricia K. O'Toole
PATRICIA K. O'TOOLE
LESTER J. ISHADO
Attorneys for Defendants COUNTY OF HAWAI'I;
COUNTY CLERK, COUNTY OF HAWAI'I AND LLOYD
VANDE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001
REAPPORTIONMENT COMMISSION

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Attorneys for Defendants
COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; and LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION

FILED
2002 JUL 19
PM 1:56

s/C. OKAWA,
CLERK
THIRD CIRCUIT
COURT
STATE OF HAWAI'I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai'i nonprofit corporation, et al.,	Civil No. 02-1-0092
Plaintiffs,	ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT OF THE COMPLAINT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS
vs.	
COUNTY OF HAWAI'I, et al.,	
Defendants.	

A 53

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF THE COMPLAINT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS

This matter came on for hearing before this Court on June 28, 2002 on Plaintiffs' Motion for Partial Summary Judgment. At the hearing, Plaintiffs were represented by Michael J. Matsukawa, Defendants were represented by Patricia O'Toole and Lester Ishado.

The Court considered on Motion, pleadings, evidence provided by both parties, affidavits, memoranda submitted by the parties, oral argument, and the files and records of this case, finds that there are no material facts in dispute and for the reasons set forth below, denies Plaintiffs' Motion for Partial Summary Judgment and grants partial summary judgment in favor of Defendants.

As is required the Court has considered all evidence, and any inferences to be drawn from the evidence in the light most favorable to the non-moving party, in this case, Plaintiffs.

Plaintiffs' motion asked for partial summary judgment on the grounds that the 2001 Reapportionment Commission used the wrong population base and that the 2001 County Council Redistricting Plan is unconstitutional because its total deviation from the ideal mean exceeds 10%.

The Hawai'i County Charter provides in § 3-17(f)(4) that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions." The Court finds that the adoption by the County Reapportionment Commission of a resident population base which did not exclude non-resident military personnel and their dependents and did not

exclude university students in the 2001 council redistricting plan was proper.

The Court also finds that there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the Reapportionment Commission.

Pursuant to Rule 56(d) of the Hawai'i Rules of Civil Procedure, the Court finds that there are no genuine issues of material fact, as to the two claims disposed of herein.

Thus, based upon the foregoing, the Court finds that as a matter of law, Defendants are entitled to partial summary judgment in favor of Defendants and against Plaintiffs on the claim of improper adoption of the resident population base in the 2001 council redistricting plan and on the claim of an unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan.

Dated: Hilo, Hawai'i, Jul 19, 2002.

s/ Riki Amano
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

S/Michael J. Matsukawa

CONSTITUTION OF THE UNITED STATES

Amendment XIV - Citizenship rights. Ratified 7/9/1868.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive

or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CHARTER OF THE COUNTY OF HAWAI'I
STATE OF HAWAI'I

ARTICLE III
LEGISLATIVE BRANCH
COUNTY COUNCIL

Section 3-17. County Reapportionment Commission.

(a) There shall be a county reapportionment commission which shall establish the boundaries of the council districts.

(b) The initial reapportionment commission shall consist of seven members, two of whom shall be residents of the combined judicial districts of North and South Hilo, one from the judicial district of Puna, one from the judicial district of Ka'u, one from the combined judicial districts of North and South Kona, one from the combined judicial districts of North and South Kohala, and one from the judicial district of Hamakua. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(c) Each subsequent reapportionment commission shall consist of nine members. One member shall be a resident of each council district as established by the previous reapportionment commission. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.

(d) The year 1991 and every tenth year thereafter shall be reapportionment years. The reapportionment commission shall be appointed and confirmed by March 1 of the reapportionment year, and shall file a reapportionment plan with the county clerk by December 31 of the reapportionment year. The reapportionment commission

shall be dissolved after the filing of the reapportionment plan.

(e) The county clerk shall furnish all necessary technical and secretarial services for the reapportionment commission. The council shall appropriate necessary funds to enable the commission to carry out its duties.

(f) The reapportionment commission shall be guided by the following criteria in establishing the boundaries of the council districts:

(1) No district shall be drawn to unduly favor or penalize a person or political faction;

(2) Insofar as possible, districts should be contiguous and compact;

(3) District lines shall, where possible, follow permanent and easily recognizable features;

(4) Districts shall have approximately equal resident populations as required by applicable constitutional provisions.

(g) The district boundaries as established by the reapportionment commission shall be in effect at the first regularly scheduled council election following the filing of the plan and for any subsequent council election. The district boundaries in effect prior to the filing of the reapportionment plan shall remain in effect during the duration of the term of all councilmembers elected or appointed to represent such districts until the expiration of the full term of such councilmembers, including any election held to fill an unexpired term under section 3-4. (Added Gen. Elec. 1990)

U.S. Code, Title 28, Part IV, Chapter 81, § 1257

§ 1257. State courts; certiorari (Release date: 2005-09-29)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Rules of the Supreme Court of the United States

Part III. Jurisdiction on Write of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court, U.S.
FILED

051325 DEC 19 2005

OFFICE OF THE CLERK

(2)

No. _____

In The Supreme Court Of The United States

BRENDA J. FORD, Petitioner,

v.

COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Respondent.

On Petition for Writ of Certiorari

to the

Supreme Court of the State of Hawai'i

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APPENDIX 2

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A 62

HAWAI'I COUNTY REAPPORTIONMENT COMMISSION

1st Session
Thursday, May 3, 2001
Hawai'i County Councilroom
25 Aupuni Street
Hilo, Hawai'i

(Partial Transcription)

The Hawai'i County Reapportionment Commission, having been duly sworn in by Managing Director Dixie Kaetsu at 9:45 a.m., and with opening remarks by the Honorable Mayor Harry Kim, County Clerk Al Konishi called the roll at 10 a.m.

PRESENT: Commissioner Lawrence J. Balberde
Commissioner Jack L. Ferguson
Commissioner John J. Fernandez
Commissioner Jeanne A. Fuller
Commissioner Mark Van Pernis
Commissioner Byron H. Toma
Commissioner Lloyd X. Van De Car
ABSENT: Commissioner Antoinette Bello
Commissioner Abbie Napeahi

ALSO PRESENT WERE:
Lincoln Ashida, Corporation Counsel
Barbara Hashimoto, Planning Legislative Assistant
Wendell M. Hatada, Executive Assistant to Mayor
Rodney Kaido, Civil Service Dept.
Al Konishi, County Clerk
Bobby Jean Leithead-Todd, County Council Member
Patricia Nakamoto, Elections

Rex M. Quidilla, Administrative Assistant, Office of Elections
John Ray, Charter Commission Chair
David J. Rosenbrock, Project Manager, Reapportionment Office of Elections
Natalie Santos, Parks Department Secretary
Jean Viernes, Mayor's Secretary
Dwayne Yoshina, Chief Election Officer
Karin Dahlgren, Council Services Supervisor

Page 9:

YOSHINA: "...three basic steps that are involved in reapportionment. Not to try to be a pedagogue or anything here, but just to kind of give you an idea of what you have to do; and I'm taking this from what I consider to be a pretty good primer on reapportionment. It was written in 1978, so some of the information in here is limited because the cases--we have case law now that have changed some of this;

Page 12:

MR. YOSHINA: You always want to avoid---

MR. BALBERDE: Problems.

MR. YOSHINA: Suits. In 1981, we had the Federal Masters that were designated to really draw the maps for the State of Hawaii. I would recommend that you try to avoid that;

Page 38:

MR. YOSHINA: Yes, what I would suggest is that you take that time and you form all your policy decisions.

Page 50:

CHR. VAN DE CAR: You had a question?

MS. FULLER: (From the audience, at times inaudible) Yeah, I was just wondering about noncitizens, military.

MR. ROSENBROCK: Well, I'm almost positive they're going to be minused out, yeah?

MS. FULLER: (From the audience, at times inaudible) What do you think?

MR. ROSENBROCK: Well, I don't set the rule. I know what they used the last time. I don't---I'm not aware of any classification that it said, you know, that we're going to include noncitizens. I mean, they don't exist, right?

Page 68:

MR. VAN PERNIS: (From the audience, at times inaudible) We already have the maps showing the . . . and are we also 3-4 weeks away from the concept of designating a starting line and then run the nine districts . . . .

MR. YOSHINA: Yes, what I would suggest is that you take that time and you form all your policy decisions.

Page 69:

CHR. VAN DE CAR: I think your suggestion is a good one, that we spend the time, before we have the data, making some policy decisions on how to use it. My question then is to you, Al, in terms of support staff and notice requirements, and those sorts of things. When are we likely---how do we go about, I guess, hiring support staff.

Page 73:

MR. KONISHI: You know, one of the things that we passed out, what I passed out right now, was the reapportionment time table that was used the last time around. And, you know, we just passed it out for purposes of your information; and, you know, this could guide you as sort of

a road map. You know, one of the things that, I guess, the Commission did right up front was to solicit public input, I guess, you know, before making the, you know, the big policy decisions on various things; and as you can see by the schedule, what they did was, they went around and I guess, you know, did a road show to gather sentiment from the public about these various issues, because--and I think Mr. Van Pernis has, I guess, the spirit of his comment is, you know, if you don't get out there to West Hawai'i and some of these other places, you know, these people might not be afforded a fair opportunity to make their feelings known.

Page 74-75:

CHR. VAN DE CAR: Okay, yeah, what I was going to suggest is that in addition to the rules being on the agenda for our next meeting, that maybe we try to adopt a time table at our next meeting, and decide things like whether we're going to go and do a road show, and, you know, where and when, and try and at least get started figuring out what we're going to do.

And, you know, one of the things Mr. Yoshina suggested is trying to make policy decisions about who to include, who to exclude, whether to maybe---what sort of starting points to look at, what makes sense as a starting point.

Actually, I'm not sure that I wouldn't rather get public input before we even do that, even those issues that I think are purely policy issues that maybe this Commission can make about who to exclude and who to include, maybe the public, you know, has some ideas, and we certainly don't know everything, and might want to hear from them on those issues as well. Mr. Van Pernis.

HAWAI'I COUNTY REAPPORTIONMENT COMMISSION

Second Session
Friday, June 22, 2001
9:00 a.m.
Hawai'i County Councilroom
25 Aupuni Street
Hilo, Hawai'i 96720

(Partial Transcription)

CALL TO ORDER/ROLL CALL

Chair Lloyd X. Van De Car called the meeting of the Hawai'i County Reapportionment Commission to order at 9:15 a.m..

Members present are as follows:
Vice Chair, Mark Van Pernis
Commissioner Lawrence Balberde
Commissioner Patrick Kahawaiola'a
Commission Steven Pvaao
Commissioner Jeanne Fuller
Commissioner Jack L. Ferguson
Commissioner John J. Fernandez

ALSO PRESENT WERE:
Dudley Akama, Counsel
Patricia Nakamoto, Elections
Ed Kozohara
Al Konishi, County Clerk
Curtis Tyler, Member, Hawai'i County Council
Julie Jacobson, Member, Hawai'i County Council
Jason Armstrong, Reporter

Page 19:

J. C. TYLER:... Now, with respect, really with the work at hand, that's kind of, policies and procedures. Some of you, I guess all of you, when you came for confirmation, hear me speak strongly about the need to adhere to the Charter provisions, under Section 3-17, regarding the County Reapportionment Commission. I speak specifically of..of Paragraph No. F, on page 6, of the Hawaii County Charter. And it says, as follows, as we get into the record, …."the Reapportionment Commission shall be guided by the following criteria in establishing the boundaries of the Council districts". Note the word "shall".

No. 1, no district shall be drawn to unduly favor or penalize a person of a political faction." That's the no political thing.

No. 2. …"insofar as possible, districts should be continuous and compact.

No. 3. And this one is to me the most important one, and certainly at least one of the most important ones. .."District lines shall "…that's another shall…"where possible, follow permanent and easily recognizable features."

And finally, as we all know, districts shall be approximately equal resident populations as required by applicable constitutional provisions…"

Page 74-75:

M. VAN PERNIS: Yeah, first of all, I think what we talked about at the last meeting, we need to decide what population are we including, and the issue was brought up to you, to include everybody or do you exclude groups

such as, the military which is an issue on Oahu, or non-resident, or illegal aliens, which may be an issue someplace but I don't think its much of an issue on this island.

And I've done some inquiry and got some feedback and there's something like 20-30 people currently stationed here that I know of up in Pohakuloa, in the military and maybe, in the Hilo side, and so I really don't think that the mili...any of these things that may be issues elsewhere should be issues for us.

I would propose that we make a motion, to basically include all people. In other words, all the people that the census counted is included because, whether they vote or not, or whether they're young or old, or military or not, they all use county services, they all pay taxes in some form or shape and they all need representations. So I think, one thing we have to do is say, what segments of the population, the census-counted population is gonna be include in our activities. And I suggest that everybody is because otherwise...

J. FERGUSON: I would so move, Mr. Chairman.

CHAIR VAN DE CAR: Is there a second?

J. FULLER: I second.

CHAIR VAN DE CAR: Is there any other discussion about the motion? (pause)

Hearing none, all those in favor, say aye.

ALL: Aye.
CHAIR VAN DE CAR: Opposed? (pause)

Motion is carried.
So we will then be...then in our work we can consider everyone listed in the census data.

M. VAN PERNIS: That's correct.

CHAIR VAN DE CAR: All right.

J. FERGUSON: There's a question, Chair.

CHAIR VAN DE CAR: Yes?

P. NAKAMOTO: May I ask a question? Will this be total resident population? So that we have a definition.

M. VAN PERNIS: Yes.

CHAIR VAN DE CAR: Yes. All right.

A 70

TRANSCRIPT OF PUBLIC HEARING
October 8, 2001
HALE HALAWAI
Kailua-Kona, Hawaii 96740
6:30 a.m.
[Partial Transcript]

Public hearing convened at 7:10 p.m. with Chair Lloyd Van de Car presiding. In attendance were the following:

MEMBERS: Lloyd Van de Car Mark Van Pernis,
John Fernandez Steven Pavao
Lisa Barton Jack Ferguson
Patrick Kahawaiola'a Jeanne Fuller

STAFF: Ed Kozohara, Elections
Patricia Nakamoto, Elections
Gina Bernabe-Haina, Elections
BrendaLynn Domondon, Secretary

COUNSEL: Patricia O'Toole

The public hearing convened at 6:30 with Chair Van de Car presiding.

Page 2

CHAIRMAN Van de CAR: The County Charter rules are specific regarding the reapportionment and it has 4 guidelines that we must follow. They are that we are to re-draw the county council districts so that no district is drawn unduly favor or penalize the person or political faction. That, insofar, as possible districts should be contiguous and compact that district lines shall, where possible follow permanent and easily recognizable features and finally, districts shall have equal resident populations as required by applicable constitutional provisions...

Page 3

So there's no misunderstanding this Commission is the final drop to the reapportionment plan. Its not submitted to the County Council for approval or anything else. Its done when we're done. It doesn't mean it is done subject to challenges, we're trying to avoid that best we can by following the rules. And there is no other body that oversees us in the terms of we adopting... adopting the plan. Once its done here, that's the plan.

Page 5

CHAIR: Brenda Ford?

B. FORD: Um...I'm Brenda Ford. I live in Capt. Cook, South Kona. Um....I'm handing out some copies, I'm sorry they're not real good, these are the deviations based on the plan that I'm going to first explain and then show you. I got this assignment one week ago, and so I want you to understand where I'm coming from. And Charles isn't here right now, that's Chucky Flaherty. He's in another meeting and he's trying to get to this one. So if he gets here in time, I'll let him explain the map portion.

First of all, trying to do this in one week, h...Char...Chuck and I developed a tremendous appreciation for the challenge that this Commission is faced. We came to this project from a little different perspective. We didn't have this mapping function, this mapping function is only after the County Elections Office's and its not available to anybody else, and the raw date that went into this is the U.S. Census deadline without excluding any of those little categories that I'm going that I'm going to talk about in a few minutes. And we didn't want to do that. We wanted to get the exclusions in there, and we were partially successful. So anyway, I just want to say that um...this is a very difficult assignment and not only for us, but we

recognize that it is very difficult for the Commissioners and the reason we got into it is because some of us in south.... I'm sorry, West Hawaii were very concerned about these particular maps. We didn't feel that they reflected the community of common interest. At least certainly not in West Hawaii and that was our biggest concern, because the computer doesn't know those kinds of things. And I'm not suggesting that I know it, or Chucky knows, knows more than anybody else in this room. But we took a shot at it from the little different perspective as I said. We believe that the district boundaries of these maps needed to be amended because the community interests are not being aligned. We did follow the County Charter for the four mandates that was already explained to you but we also added some working assumptions on our project.

The first one was that we had to keep communities of common interests together and that means a community of common interest to us meant that the people lived in the same geographical area, they have a similar economic base. And I don't mean money, amounts of money, I'm talking whether they are agricultural, rural, whether they're urban or light industrial, or they're resort areas, or whether they are transportation center like an airport.

Um...that they also shouldn't say they share the same town center for their daily stuff. For instance, where their schools are, where the churches are, where the shopping is, um... where their cultural events take place. If that's are the daily stuff that we all go through on a daily basis, you know, where that takes place is...as a common area.

And then we also looked at where the people go when they need to get to a larger area to do, say major shopping. And there's on our Island, of course there are three major areas, Kailua, Hilo and Waimea. And which of those areas were these people more aligned with. So we, that's the attempt

that we made, ah, those were some of the working assumptions, we also did the very best we could to keep subdivisions together and intact. We only one or two subdivisions that we actually had to split and that's because the census tracts were so huge, they had, some of them had ten thousand people, or 7 thousand people, we had to split some of the over to Puna section. Sorry, Julie.

Um...the other thing that we did is, we used a different target number than this Commission did. They used 16 thousand 5 hundred twenty, and that's because they used the U.S. Census Data and they did not have the exclusions at all. And we had some of the exclusions. And I apologize in advance because I'm sure our map is going upset every council member, every boundary changes. We...one of the things that was raised at another meeting was how difficult it is to print ballots when you don't have overlapping House and Senate and County districts. And we took a look at that and we finally threw up our hands and said, there's no way. We're going to have to print multiple ballots if we're going to align ourselves based on the Charter and based on our community of common interests. There's no way that we're gonna make the boundaries of the maps. I am...I have been a precinct worker for the last two years and I can tell you for the...for the issues of who shows up in what precincts to vote, if you're in the wrong precinct, the precinct leader will call your correct precinct, have your name removed from that precinct so you can't vote twice, and you'll vote right where you are. We don't make people run around, so the issue of people going to the wrong precinct is really a non-issue. Its hard on the precinct workers, but we get it done. At least we get it done in West Hawaii.

The other thing is, there will be multiple ballots because people are going to have to vote for one Senate and there's gonna be, possibly in another...in another County district. So let me tell you how we got started on this. I called the County Elections Office and asked them for the information, the Census data and I was refused because this is a licensed piece of software that we're using, and they can't let anyone else use it, they couldn't download any data to me even though it was public data. They could not, even if they wanted to, and so I called the State, I got hold of the State Reapportionment staff, and I Gwabled [sic - groveled] ..and I begged, and I got them to download the U.S. Census Data to me for this Island, and then I got them to download two of the three exclusion groups. There's the non-resident military dependents which we all heard about, we all know of that disaster. That's still is not available because the State Commission has not made the decision to exclude it and so they haven't required their staff to do that job. So we don't have that information. However, we did get the active military, and our Island has only 62 active military personnel. Only 62. And so the number of dependents that they're gonna have with this is gonna be a very low number. It probably won't even make a decimal point change in any district. But it should be there but it isn't. The other thing that I hadn't heard about was non-resident students at the universities. That was part of the exclusion base that was not included in some of these maps. So the total number...the total number that we started with was slightly lower than what the...this Commission worked with. And we had this information down to the Census block. We've got a huge data base that we've created now with a lot of this information and then we borrowed the maps from Mark through Curtis, and we put them together on the floor of my living room and we've been crawling for 5 days on our hands and knees across

these maps. And we looked at the way the things...the blocks and the tracts are designed, the blocks are the very tiniest units, usually that's a little tiny neighborhood, maybe bordered by two or three or four streets. And then those blocks are put together into a tract. Um...and we decided when we look at the census tracts that there were lines that were just defied any reason. They were... the doggedly, they ran helter-skelter all over the place and they...it looked...it..it not only looked bad, there was no reason for it. And so when we did our cut, we actually got down the maps and found the census blocks that were in unusual places and we straightened out the lines. Okay? So those were the...that's how we did this job, we did it manually and plugged the information into my database.

So I'm gonna ask for some help, I'm going to ask my husband, Sandra, if you want to help, um...I've got a map here and I'm gonna apologize in advance. We started this map late this afternoon, we got half of the map drawn, and I've got a little tiny map with the Island on it. So we want to show you what we've got, and the Commission needs to see this. Is it possible...Chuck, come on up, you can explain. Chucky's here, he can explain map to you. I didn't see him come in. Come in here, we have to give them our spill.

C. FLAHERTY: (INAUDIBLE-SPEAKING FAR FROM MIKE FROM AUDIENCE)

Boy, what an influence, yeah?

Okay, um...as Brenda said we um...the first thing that we started off with was the fact that District 6 or the southern district of this Island is going to be huge no matter what you do. Its gonna be cumbersome for whatever council person has to deal with it. Um...from what we had heard,

the map that was being preferred had Kealakekua Bay aligned with Volcano and down towards Mt. View in the same district which I and Brenda just didn't think was plausible. So, we looked more on the lines, aligning Ka;u and South Kona, both of which are rural, both of which are agricultural, and both of which are still relatively pristine open areas, as well as, have large populations of native Hawaiian peoples and who are seeking, you know, all of their practices. Um...the other thing we wanted to do was, we want to do what...as we're looking at these numbers, we realize that a Kailua-Kona district would be created. Ah...and so that's what we did. We created an urban light industrial, Kailua-Kona urban area which gives on the general plan, zones to be an urban area. And so we tried to include all the areas um... within Kailua that's scheduled for urban development within a district. Doing that allowed us to remove the Volcano Village an areas east from District 6, and moved District 6 up towards Kailua-Kona so that it includes a good deal of the Kona Coffee Belt. Ah.. we did try...we did look and tried to include the entire Kona Coffee Belt, um...in a district because of its importance to Hawaiian agriculture, but its just because of the distribution of the population, the way that the Island is, and having 9 council members, there's just no way to do it...or at least not at this time around.

So we got as much of the Kona Coffee Belt included in District 6 as we could, again, in keeping what the rural, agricultural nature of that. So we have an urban district for Kailua, then the district, and that would be District 7. The District 8 would then become what we call a residential resort community district that contains Kona International

Airport, (inaudible), as well as, Kawaihae Harbor, so some major transportation hubs for West Hawaii. And this entire coastline is slated for luxury golf course resort type

developments, as well as, the ancillary supporting communities that will be necessary for the workers, such as Waikoloa Village, which in itself had…we're really surprised that one of the census blocks that contain Wailokoa Village has 7,000 people in it. So it's a substantial number of people within that particular areas as well.

CHAIR: Mr. Flaherty, please hold up for a second.

C. FLAHERTY: Sure.

CHAIR: Since it is the Commission that you need…oh, I'm sorry, that and I'd like to be fair to everyone who signed up to speak. So the Commission members are pretty familiar with some of the things that you say. So if you just explain the map, as to where the boundaries are…

C. FLAHERTY: Okay.

CHAIR: …and leave the advocacy maybe for our meeting on October 18…I'm…

C. FLAHERTY: Sure

CHAIR: ….sure you'll appreciate it.

C. FLAHERTY: Well, anyway the challenge was to again bring communities together, so basically what we have is the North Hawaii district which is the communities of Hawi, Kapaau, those two, Waimea, as well as, Honokaa. Um… which is, of course, will serve the Kohala geographic area. We have North Hilo district which extends down the East coast to Kawaihae from Honokaa into actually, down into Hilo. Again, through Hilo urban…is essential Hilo which is sort of like central Hilo, and then we have basically a suburban Hilo area, which is also an urban area. And then we created two districts for Puna and we tried to draw as many Hawaiian Homelands as we could get it into the north Puna district and also south Puna district as you can see has already been drawn out on this wall. And the

only subdivision that we had to separate was the very small portion of Hawaiian Paradise Park. All of the other subdivision we were able to keep intact.

So basically that is the proposal that we came up with. We only had a week to do it, obviously we would have liked to had more time to be able to tweak a little bit more, creating a little bit more of a buffer zone around Waimea, for instance, because it is this the way the district is drawn right now. This comes rather close to that...to that area. But the concept that we came up with, the reason that we came up with this, we wanted to keep the urban areas represented by urban council people and rural agricultural areas represented by rural council people. And that represents, I mean, that is more degradable of the demographics of this Island, as well as, the geography um...of this Island as well. So obviously, there's no perfect solution but that is one that we came up with. Thank you.

CHAIR: Thank you. Um...if the both of you could sit up here, I have a couple of questions. Um...assuming that the Commission wants to work further with the map, we would appreciate if you would give us the information regarding the census blocks so that we can ask the staff to do more work with the census blocks that you worked on. Um...other than that I don't have any questions.

Does any other member of the Commission?

M. VAN PERNIS: You just said that there are 3 economic centers on the Island, Hilo, Kona and Waimea. We've heard quite a bit of testimonies that Puna considers itself to be an economic center, too. You didn't consider that to be another economic center?

B. FORD: (INAUDIBLE - SPEAKING FAR FROM MIKE)

M. VAN PERNIS: Do you think its appropriate to divide North Kohala from South Kohala and divide Hamakua in two districts when we've heard quite a bit of testimony and evidence of North Kohala basically is entirely West Hawaii oriented and its economic place both in terms of jobs, shopping or ...so what you do is basically divide Hamakua, and divide Kohala for the sake of creating two more Kona oriented districts. Do you think that's appropriate to divided North and South Kohala into two different districts.

B. FORD: Yes, I personally do, the fact remains that we have to have the right numbers, we all know this. If the fact also remains that even North Kohala and South Kohala may be West Hawaii oriented or Waimea oriented, it's the fact that we drawn these lines in a particular manner isn't going to stop that, we're still going to be involved with this. We thought it was most important and we have the numbers to justify it that south...the South Point area, all of that area, Kailua urban area, the North Kona, South Kohala section and the North Kohala have representatives inside those districts representing the West Hawaii perspective. And most of these other maps basically give us, we representatives on this side of the Island, because they drag Ka'u and South Kona all the way over to Puna...

CHAIR: Oh....

B. FORD: ...and we thing that's totally inappropriate.

M. VAN PERNIS: So basically you devised this to basically create corner districts where representatives and move the lines forward and move the rest of the area....

B. FORD: No, we did not let the lines go where they may. We did the very best job we could to make this reasonable

cut. We believe that Puna is with the numbers and entitle them to two districts, our numbers entitled us to four. Its not....its not a matter of trying to do somebody out of something, we have the numbers to justify this.

M. VAN PERNIS: And your District 6, where is this northern boundary?

B. FORD: Its um...Chucky what's the northern boundary on 6?

C. FLAHERTY: It runs...it runs just from the south of Keauhou Bay, basically up mauka.

M. VAN PERNIS: So Keauhou Bay does it run Kahaluu for instance?

C. FLAHERTY: I'm sorry?

M. VAN PERNIS: Does it run as far as Kahaluu?

C. FLAHERTY: Ah...no.

M. VAN PERNIS: Is it on the north side of Keauhou Bay?

C. FLAHERTY: No, its on the south side of Keauhou Bay and it runs through an area which at this point is relatively undeveloped. It runs through these ...through the south of Keauhou Bay Estates, south of the golf course, it runs north of the Hokolei'a Development that's basically a very open ranch land type of area at this point. So it is sort of a natural demographic break, so...

M. VAN PERNIS: So, its between Kainaliu and Keauhou Estates?

C. FLAHERTY: Its between ...its between Kainaliu, it runs basically through the Honalo area.

M. VAN PERNIS: And would you feel that students ....oh, that's all right (referring to B. Ford)...students who reside here are not entitled to representation?

C. FLAHERTY: Ah...Brenda would like to address that.

B. FORD: (INAUDIBLE-SPEAKING AWAY FROM MIKE)

M. VAN PERNIS: Okay.

C. FLAHERTY: There's two things I'd like to say. One thing is, all the other plans divide Kailua Village in half.

CHAIR: Ms. Ford, would you simply answer the question?

B. FORD: The students...no, I do not believe that non-resident students who have homes on some other Island or some other continent should be voting in our State and should not be included in our census data base.

M. VAN PERNIS: Even if they're registered to vote?

B. FORD: If they're registered to vote and their non-resident students, they are not telling the truth.

M. VAN PERNIS: Or do you feel that ah...if they're living here the majority of the time are they entitled to representation?

B. FORD: My opinion is, if they are a legal resident someplace else, then they vote someplace else. If they are legally a resident here, then they shouldn't...then they won't be paying non-resident fees to the university, because then they are legally a resident. My son spent a year as a Honolulu resident...

M. VAN PERNIS: Are you that if a person votes here they are entitled to representation. If they don't vote here, they are not entitled to representation.

B. FORD: Yes.

M. VAN PERNIS: So all of the kids here are too young to vote and are not entitled....

B. FORD: No.

There...if you are a child of a legal resident here, then you have...you should have complete representation. That's what the census is all about.

M. VAN PERNIS: But if you are a legal resident but are not registered to vote?

B. FORD: How can you be a legal resident and not be registered to vote?

We have friends that are registered in other states. We have snowbirds that come in and...

M. VAN PERNIS: There's lots of people ...

B. FORD: Okay. Yes, you're...

M. VAN PERNIS: If you're not registered to vote or...

B. FORD: Then they can't vote (emphasized). Then why...why would they be counted?

They're probably counted in the census population, I don't think that the students who are non-residents should be part of our census space, and they are excluded by the State.

CHAIR: Mr. Pavao?

S. PAVAO: Why...I don't know what the right word would be but why is District 4 - 5 and why is District 4 -5?

B. FORD: That's the way the districts are today. And the numbers are really immaterial, but right now, South Puna is..

S. PAVAO: If you look through the numbers the logical sequence would go 1 - 2- 3 - 4 - 5...and

B. FORD: I numbered them the way it exists today. They can be renumbered or relettered if that's...

S. PAVAO: But that's the way it exists today, and the number...

B. FORD: Julie, what district are you in?

S. PAVAO: 6.

B. FORD: 6?

S. PAVAO: That District 4 is 5.

B. FORD: Okay. That's....I can get in a race [sic - eraser] 8 and take care of that.

S. PAVAO: The other two questions I have is, maybe I'm wrong...you don't tell me what tax block the school is. As I count it, I count 10 districts, maybe you have opened up another ....

B. FORD: No, no, no.

(END OF TAPE 1)

Even worst than that some of the census blocks have

three or four thousand people in them. And so it makes it real awkward trying to separate them. I...I don't know if you can do anything about it, but whatever, its Hawaiian Paradise Park.

J. FERGUSON: All right, the next question is how many people were cut and put into another area?

B. FORD: It went...we went district by district. and we took the census....we tried to...

J. FERGUSON: Just on the map you substituted, how many people…?

B. FORD: I have to look at the database. I'm not even going to guess.

J. FERGUSON: And ah…how many students?

B. FORD: Seven hundred thirty eight non-residents students.

J. FERGUSON: Seven hundred thirty eight?

B. FORD: That's from the State and 62 active military. No numbers yet on the others.

CHAIR: Thank you very much. Any other member have a question for Ms. Ford?

Mark?

M. VAN PERNIS: I see you split 7…you split mauka from makai in your District 7, all right? Is that split along Mamalahoa Highway?

B. FORD: Part of it. Um…Chucky, I can't…this map doesn't have the streets on.

M. VAN PERNIS: So basically, you decided to put the makai side of Mamalahoa Highway…

C. FLAHERTY: No.

M. VAN PERNIS: …In District 7 and the makai side in District 8?

C. FLAHERTY: UM…Mamalahoa Highway…Okay…

M. VAN PERNIS: I'm sorry, I can't see it.

C. FLAHERTY: Where Mamalahoa Highway splits from Kuakini in Honalo. Okay, we basically included District 8...excuse me, District 6 basically goes all the way to...

M. VAN PERNIS: I'm talking about District 7 only.

C. FLAHERTY: Oh, District 7 only?

M. VAN PERNIS: Your District 7.

C. FLAHERTY: Its basically from Kuakini mauka until you get into the area of the Department of Water Supply Road, then it goes up at that point, I believe, and follow...where is it? So, it basically follows Kuakini, then it goes back up um...I'm trying to see...

M. VAN PERNIS: That longest stretch from south to north, is it along Mamalahoa? It appears to be.

C. FLAHERTY: At the very bottom?

M. VAN PERNIS: No, at the top, that longest stretch.

C. FLAHERTY: Yes, that's Mamalahoa Highway, it comes down, you see it comes down with an indention, that is the area below Holualoa which is the coffee growing region then it comes back up to where there's a lot of urban development..

M. VAN PERNIS: Well, Holualoa is not...well, you can call it coffee but its more urban than anything else, it's a bigger community than Kailua-Kona, I live there. But the point I'm making is that you felt that it was appropriate to divide 7 from 8, at least for a significant portion by Mamalahoa Highway?

C. FLAHERTY: Um...we did the best we could, certainly someone elses work ...

M. VAN PERNIS: I appreciate your effort. I'm just trying to get information, but I'm wondering whether you split that because of geography because you felt there was some cultural or economic difference between the mauka and makai side.

C. FLAHERTY: We were looking....we were trying to look at economic differences, people who...and lifestyle differences, people who were more, for instance, in town versus people who prefer a more rural environment, um...suburban, to me is more people who are utilizing an urban whereas rural is someone who doesn't necessarily have a need to go into town.

M. VAN PERNIS: Is this on Mamalahoa north or south Palani Road?

S. PAVAO: North.

C. FLAHTERY: As far as?

M. VAN PERNIS: This division. Is it on Mamalahoa, north of Palani Road?

C. FLAHERTY: No.

M. VAN PERNIS: Thank you.

C. FLAHERTY: No. We weren't able to...we weren't able to because of the numbers unfortunately.

CHAIR: Thank you very much. Thank you both very much.

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CHAIR: Sandra Scarr?

S. SCARR: Good evening, thank you for coming over to Kona, and thank you for listening to us, and I guess as you can see that many people in Kona are very concerned about how our districts are construed. I'd rather you listen

(inaudible-speaking away from mike). I am speaking to all of you. Let me speak first to you.

Um...thank you for coming and I appreciate your listening to us, and I think we thought a lot about the guidelines under which you're working, which is to draw contiguous districts that are not too favor any...or disfavor any existing arrangement, or person. All right?

And I think it was very hard for us to say, okay, let's think ten years ahead. Let's think what our County is going to look like in ten years. Where is it going to grow, where do we need to predict what kinds of economic and demographic interests people will have in common. And I think that what Brenda and Larry...Brenda and Chucky had presented and Larry, as well, has such compelling underlying interests. Let me, I want to say them again.

If you take the area from Ka'u through South Kona and then the mauka lands of North Kona where people are farming, you have a solid agricultural district and you would have a representative elected from that area representing agricultural interests. I also live in Holualoa and I'm a coffee farmer so I...I feel that strongly...that, that's a very important group not to be deluded by the growing urban numbers. Now, speaking for the urban Kailua-Kona district there is no reason that 20 thousand people who could be construed as being as being in urban Kailua-Kona that's certainly a council district. Why should we be divided? Why should Kailua-Kona have to have half its representation in one district and half in another? Its seems sensible at this point in time, and maybe it wasn't sensible ten years ago but its sensible now and henceforth to say, "Kona deserves a council district all in itself, Kailua-Kona". And then we have the suburban people on the north side of North Kona who orient some to Kailua-Kona but some to Waikoloa. There are people...some of them

who work out in the resorts. Then you have Waikoloa Village, surely, a lot of those people are working in the resorts and up north. And then you have many developing residential areas in North Kohala, north of Kawaihae. I drove up that area just less than two week ago, and its astounding how much luxury resorts, luxury subdivisions are going in up there. So, there's a lot of coherence between the resort areas of south Kohala and the resort areas of north Kohala. But when you get past, you know, before you get to Hawi, now you still got traditional sugar lands, cane workers, ex-cane workers, resident...rural agricultural and ranching people. And that extends all the way back down to Waimea but on the north side. So I'm saying there's a lot of coherence to what Brenda Ford and Chuck Flaherty had presented to you in those districts. I think we feel less confident, I will speak for myself about speaking to the people of Hamakua or speaking to the people of Puna. And I think you've heard from them as to what they want. But I think talking about West Hawaii, we do have some knowledge and we do really think that this presents at least the beginnings of a very good plan, and we'd like you to take it seriously.

Thank you.

CHAIR: Thank you. Do any of the members OF THE Commission have questions of Ms. Scarr?

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David Holzman?

D. HOLZMAN: My name is David Holzman. I live in Kailua and I'll read along with you here so the audience can hear it. First for all, aloha and thank you for giving us this opportunity. I know your guiding principle has to be one person-one vote and you're not bound to please anyone, its just not possible and I commend you for taking

on a difficult responsibility. In the hope of not making your job more difficult, I wish to make a suggestion on how you can enhance and make more perfect the principle of one person-one vote. Sections 37- 317 of the County Charter, Item 4, states the Reapportionment Commission shall determine equal population districts as required by a applicable State Constitutional provisions. Now our Charter does not spell out what those applicable State Constitutional provisions are. So I went and lookedthem up. The Hawaii State Constitution, Article 4, Section 6, ask you to be guided when practical, I guess you know these, by the criteria of not favoring political parties, districts should be contiguous, compact and easily recognizable geographic features, and don't mix different socialeconomic areas. That's what I think has been overlooked so far. Don't mix different socialeconomic areas. However, on the criteria of different social-economic areas, the Constitution ask the Caveat that submerging one area in another district with a substantially different socialeconomic interest shall not be...shall be avoided. Now that's the only one of those provisions that Constitution then says, shall be avoided. This Caveat is very applicable to our County and I will present reasons why it should adhered to.

First I want to call your attention to the Constitutional Convention of 1968, Section 5, which reads as follows:

Whenever possible, the division of areas with substantial community interest (socialeconomics) is to be avoided. That homogenous group should participate in the political process as a unit, rather than be split up arbitrarily into small fractions of two or more groups. The homogenous groups, your committee needs to decide, the numbers of which are alike in the social-economics status to the extent possible, your committee believes that areas with substantial community interests shall not be divided.

Now this criterion of not dividing social-economic groups has been challenged and upheld in State and Federal courts. First, your Supreme Court with Burns v. Richardson 1963 and again Burns vs. Gill 1972, those are Hawaiian challenges to the Constitution. The Federal courts found that artificially chopping up canoe districts results in a complete loss of meaningful representation. Now I believe the Constitution is exclusive on this point, and the Federal courts agree that because it gets to the heart of equal representation under the Law and compliments and makes more perfect the importance of the one person-one vote. Think of it. If you put equal numbers of people in each district, you have not necessarily given equal rights to each person's vote. Because of one social-economic group is in the minority, and of a lower status and has different needs than the majority higher status group, you've weakened the political power of the minority group . '

Now, there are several different methods that identifies social-economic status. But more social side is generally agreed that it is comprised of the factors that gives people and their children similar-like chances to achieve a higher quality of life. Those factors are primarily family income, educational level and political power. When you look at the Hawaii County Data Book of family income, educational level and unemployment rates, which is related to income, you will find 3, a defined clusters of social-economic groups. One is Hilo, urban area has been stated, the other is Kailua-Kona urban area and the third is Puna. If you look at the other districts, we are fairly close to the County average of social-economic status.

As Brenda and Charlie pointed out, it tends to be more rural. And some were income and some were educational levels. The census data shows, many of you know

intuitably, that Puna has a lower family income, a low educational level than Hilo or Kailua-Kona. The family income differences can be as much as 2 to 1, between Hilo and Puna and Kailua and Puna. Educational levels are twice as high in Hilo, than Kailua-Kona as in Puna. Unemployment last year 2000 was 50% higher in Puna than Hilo and over 1 hundred per cent higher than in Kailua-Kona. So given that low family income and educational level to citizens of Puna and their children have very little chance of bettering their lives compared to the 9 political representation. Political representation is difficult at best, but almost impossible if elected officials have to represent 2 widely different socialeconomic populations. It becomes a tough juggling act to submit capital improvements needs, offer legislative remedies and keeps folks on the needs of your constituents.

Now because social-economic status is highly correlated with the types and frequencies of criminal offenses and the need of social services, consideration should be given to following the judicial district boundaries in the County as much as possible. As you know, the police, fire, public works, parks and recreation, and the courts are all organized by judicial districts. Therefore, to use judicial districts as the guiding principle and take care not to split the three socio-economic defined groups of Hilo, Kailua-Kona and Puna, you'll go a long way to the needs of the people with their political representatives and the social services, and the safety of fire and police protection that they need. This is very doable because north and south Hilo judicial districts of the population, 49, 106, the three council districts, the Puna judicial district has enough population, 31, 335 for two council districts, and the north and south Kona judicial districts have more than enough, 37,132 for two council districts. Since north and south Kona have excess population, it becomes necessary to look for

equita...equitable ways to figure the south, north and remainder of the west areas. I leave that up to you and to your Office of Elections staff. That I don't want to get into, I see what happens when you get into that. I urge the Commission to ask the County Office of Elections to prepare a new map, a map that gives the highest priority of the several constitutional criteria to social-economic status, and above all avoid splitting upper Puna into 2 districts, one of which is Hilo. Where the maps start as key, therefore, I order you...in order, excuse me...I order you...I take that back. Excuse me. In order to keep faith with our State Constitution I recommend the maps to start at the judicial district between Hilo and Puna.

One last statement. When the Hawaiians started their society along naha ahupuaas, they wisely guaranteed that each group had access to all that is necessary to their quality of life. Everyone in the Island could access to the forest for wood, the midlands for agriculture and the ocean for fish. The alii did this to minimize the conflicts between the groups. Look ahead ten years from now, and you should be as wise because we all live on an Island and one segment is to deny access to the means of improving the quality of their lives we will never truly enjoy our harmonious Island.

CHAIR: Thank you very much. Any member of the Commission have a question for Mr. Holzman?

M. VAN PERNIS: Mr. Holzman, I didn't get it but where do you live?

D. HOLZMAN: I live in Kailua.

M. VAN PERNIS: And ah...do I understand you right, you are advocating the poor folks be in one district and the rich folks in another district and so on and so forth?

D. HOLZMAN: Ah...that's where the poor folks live and that's where the rich folks live.

LADY FROM THE AUDIENCE: (INAUDIBLE-FAR FROM MIKE)

M. VAN PERNIS: So you're basically advocating that the division by economic divisions is more important than getting the numbers right?

D. HOLZMAN: No, I didn't say that.

M. VAN PERNIS: But you want the numbers divided so that the poor won't be all in one district and the average and rich are all in another districts?

D. HOLZMAN: No, I didn't say that either.

M. VAN PERNIS: Well, that's the way I hear you're saying.

D. HOLZMAN: Well, you better listen to what I'm saying, I said there are two urban areas with higher educational levels and higher income and that's Hilo and Kona...Kailua-Kona basically.

M. VAN PERNIS: So you're basically advocating two... all poor folks be in two districts, right?

D. HOLZMAN: You're making it sound like I'm kicking the poor people into Puna, I didn't didn't put people in Puna, but I'm looking at the County Data Book....

M. VAN PERNIS: But you're advocating that the... that they not be mixed with the socio-economic...

D. HOLZMAN: That they can't get out, that I'm putting a bridge and I'm tearing down barriers?

M. VAN PERNIS: For instance, would you be satsfied....would you be satisfied if there was a district that had 3 quarter of the poor people in it and 1 quarter of the middle class and upper class in it so the poor people can still control the district?

D. HOLZMAN: That's highly hypothetical, I'm not going to respond to it.

M. VAN PERNIS: If its hypothetical, you see it on 3 maps here.

D. HOLZMAN: Where is that? Show me the socio-economic status of those maps. You can't do it! (emphasized)

M. VAN PERNIS: I can't do it, sir. But the point I'm making is that you seem to be advocating Ms. Jacobson's plan, is that correct?

D. HOLZMAN: No.

M. VAN PERNIS: Okay, the two perfect districts for Puna and the rest you say, leave it to us to work out?

D. HOLZMAN: I say, follow the Constitution, not split socio-economic groups. As a sociologist, I have a PHD in sociology, and I can tell you there are only 3 identifiable,

clearly identifiable, statistically significant socio -economic groups, one is in Hilo, one is in Kailua, and one is in Puna, upper and lower Puna.

M. VAN PERNIS: And....

D. HOLZMAN: That is statistically significant socio-economic groups.

M. VAN PERNIS: How about the Kohalas? Where do they fall?

D. HOLZMAN: Close to the average.

M. VAN PERNIS: They do...and you're sure?

D. HOLZMAN: Of course, you're gonna find pockets here and there, yeah.

M. VAN PERNIS: Well, there's some very rich folks in Kohala and some very poor folks in Kohala, so together they are average.

D. HOLZMAN: Some of those poor folks aren't even residents there.

M. VAN PERNIS: Now, um...you said you'd leave it to us, you've advocated two districts in Puna and two districts in Hilo and you'd leave the rest to us...

D. HOLZMAN: 3....3....3.

M. VAN PERNIS: 3 in Hilo and and you'd leave the rest to us and...

D. HOLZMAN: And 2 in Kailua.

M. VAN PERNIS: 2 in Kailua and you leave...and how much of the ah...south part of the Island would you put in the Kailua district?

D. HOLZMAN: I have no idea on that.

M. VAN PERNIS: And how much of the ah...Hamakua ah...districts would you put in the Kohala.

D. HOLZMAN: You have my presentation, I didn't make a single statement about where you put those.

M. VAN PERNIS: So you don't have any idea how the splits goes?

D. HOLZMAN: I gave you a guiding principle, Constitutional principle...

M. VAN PERNIS: All right.

D. HOLZMAN: And I gave you the 3 sociio-economic groups, I gave you the judicial districts, I make no other claim, I have no other knowledge that I wish to present to you tonight.

M. VAN PERNIS: And if we need to make some other division of the Kona, Puna and Hilo districts in order to accommodate these other geographic areas in order to meet the one man-one vote principle, you are for or against that?

D. HOLZMAN: For what?

M. VAN PERNIS: In order to meet the one man-one vote principle we would have ...

D. HOLZMAN: That was the first part of the question?

M. VAN PERNIS: If we had to divided up Puna, divided up Kailua-Kona, divide up West Hawaii, divide up Hilo and add to parts of Hamakua or the south part of the Island, in order to meet the mandate of one man-one vote, would you say that the socio-economic requirements are more important?

D. HOLZMAN: Is there one answer to that question?

M. VAN PERNIS: I'm asking you, sir.

D. HOLZMAN: Listen to what I'm trying to say. We have one voteone person, one person-one vote. But if you put those people in predominantly social... predominantly....don't take exception, predominantly, different, socially-economic groups, the Constitution, the Supreme Court, and the Federal Court will tell you, you have violated the Reapportionment rules.

M. VAN PERNIS: You have defined as I understand it, 3 districts?

D. HOLZMAN: Correct.

M. VAN PERNIS: Is that correct?

D. HOLZMAN: I...no, no. I have defined 3 socio-economic groups.

M. VAN PERNIS: All right.

D. HOLZMAN: Well, I used to call it

M. VAN PERNIS: You're advocating based on your logic, 2 districts in Puna, correct?

D. HOLZMAN: They have the numbers.

M. VAN PERNIS: And you're advocating 2 districts in West Hawaii?

D. HOLZMAN: No, I didn't say anything about West Hawaii.

M. VAN PERNIS: Well, 2 districts in Kona..

D. HOLZMAN: Ah....Kona, yes.

M. VAN PERNIS: All right. Is there any difference between that and West Hawaii, I'll accept that. And how many districts in Hilo?

D. HOLZMAN: I said that already, 3.

M. VAN PERNIS: All right, that's 7 districts, right?

D. HOLZMAN: Oh, God. Oh, man. What did you do?

M. VAN PERNIS: Isn't that 7 districts?

D. HOLZMAN: What....what? No, listen. I'm not going to answer those silly questions like that.

M. VAN PERNIS: Well...

D. HOLZMAN: Its so hypothetical, I mean....

M. VAN PERNIS: Well...

D. HOLZMAN: I gave you my presentation, I told you what I had to offer, and you got me playing a numbers game....

M. VAN PERNIS: Well...

D. HOLZMAN: And now you tricked me in a numbers game.

Ooh...good for you.

M. VAN PERNIS: You've advocated 7 districts....

D. HOLZMAN: I have not advocated 7 districts! (emphasized)

M. VAN PERNIS: ...and I want to know...

D. HOLZMAN: I have not advocated 7 districts and in answer to your silly questions, I still say, I don't know!

M. VAN PERNIS: All right, that's what I wanted to hear.

D. HOLZMAN: Thank you.

CHAIR: Do any other member of the Commission have a question for Mr. Holzman?

Mr. Holzman, thank you very much.

.....

This concludes our public hearing.

HEARING ENDED AT 9:40 P.M.

TRANSCRIPT OF REAPPORTIONMENT COMMISSION MEETING
Of
October 18, 2001 at 9:00 a.m.
Hawaii County Councilroom
25 Aupuni Street
Hilo, Hawaii 96720
Session 4

(Partial Transcription)

Page 5:

CHAIR: Let me move on then, simply call the people in order of the notices that I have here.

I would like to get and I would like to impose some reasonable limits on..in terms of their statements to the Commission and I would ask that each of you providing statements attempt to keep your comments to no more than 5 minutes. I believe looking at what we have here, that the members of the Commission have heard from each of you at least once. So having said that, the first note I have here is - from Charles Flaherty and Brenda Ford.

Mr. Flaherty, Ms. Ford?

B. FORD: I'm Brenda Ford of Captain Cook, and I'd like to start off by um..clearing up some possible misconception. Last time I spoke before this Commission about ten days ago, I made a comment about the Elections Office and my inability to get the information I needed from the Election Office. And I am afraid that it might have been perceived as the Elections Office not being supportive. And that is not the intent that I had specifically talking about the database

that I work with. The Elections Office personnel workers were gracious, they were informative and they were helpful at all times. I could not have started this without that assistance. And more importantly, they gave me the phone number of the State person. So I want to make sure that the Elections Office did a wonderful job for me.

We've handed out a revised map, you know, the last time we came here we did not have it colored out where we wanted it colored out, and had to make some few refinements. Chucky will talk about those, and we've given you comments, and Chucky will be making a little chart that explains things like the number of people in each district, the deviations and target populations, and the urban districts. And I'll let Chucky take over from here.

C. FLAHERTY: Good morning.

As this is provided as written testimony, I won't read this entire submission to you to save time. Basically, what we've done with this map is to recognize the urban areas of the Island of Hawaii as deserving of districts. And that central Hilo, and southeast Hilo, as well as, Kailua-Kona, Keauhou-Kailua-Kona areas, are..have sufficient population. Actually, Kailua-Kona has more that sufficient population for an urban district, and we're forced to divide the ahupua'a of Kealakehe in order to create this urban district so that the mountain portion of Kealakehe is actually in District 8 which extends up to the northern part of this district to the South Kohala-North Kohala boundary.

The map does bring together the sort of resort, residential retirement area of West Hawaii into District 8. District 9 is a north Hawaii district which is ranchland and rural agricultural area. Then district-wise you have toward the

east side of the Island is a basically rural area with most of the population being sort of a suburban north Hilo area, as well.

I covered the central and southeast Hilo districts which central Hilo contains the downtown area and mauka urban, commercial and industrial areas of Hilo, while the south and east of Hilo contains the international airport, the harbor, Keaukaha and wraps around containing the portions of suburban, urban Hilo.

Puna, north Puna is basically the northern part of Puna, with some area of Ka'u situated with Volcano Village and the National Park.

And then south Puna, we put as a separate region because of its accessibility. It's only one way to get to that area. And we did include the entire area of Hawaiian Paradise Park and Ainaloa in South Puna, as well.

As you can see the variations, the deviations on our numbers are within the parameters of less that 5% which was our goal and basically the map that we presented has its basis, the social economic demographics of the different areas of the Island, as well as, economic activities that we see occurring over the next ten years.

If you have any questions, I will be happy to answer them.

CHAIR: Any members of the Commission?

Hearing none, thank you very much. Next is Al Konishi.

A 102

REAPPORTIONMENT COMMISSION
25 Aupuni Street, #100
Hilo, Hawaii 96720
Phone: 961 8277
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TRANSCRIPT MEETING OF
HAWAII COUNTY REAPPORTION COMMISSION
November 21, 2001
10:00 a.m.
Waimea Community Center
Kamuela, Hawaii
(Partial Transcript)

Page 15:

SANDRA SCARR: The commonality of interest between Ka'u and South Kona is pretty clear. Someone pointed out just a moment ago, that in fact a lot ...this is really a large agricultural area. So I would argue with you that this map and it isn't you know...it may be some some tweaking around the edges but in fact this map comes in with ..within the plus or minus 5% that you require, and I think you should require for any map, would population, and it does a better job than you're doing with putting the minuses into the areas of rapid growth. Unfortunately, in your map the areas that are currently plus over in population are the most rapidly growing areas. The ones are under population are those that will not be growing very much in the coming years, as far as we can project. That means that two years from now, or three years from now, you will have exceeded your 5% deviation and you will know that. You already know that, that's what's going to happen. So would argue with you, this isn't a very acceptable map.

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CHAIR: Any other member of the Commission have a question?

Hearing none, thank you very much, Mr. Martin.

Ms. Ford? Brenda Ford?

B. FORD: I've come to the meeting here in Waimea to explain some of the points of the process and the result of the plan that surges accordingly. But I had some input, too.

First thing I'd like to talk about is just basic raw data. When we started, when we were first requested to do an analysis of the raw census data, that is without any exclusions whatsoever, to determine if any of the 9 maps this Commission had been working on at that time, met, what we felt the constitutional guidelines. The first thing that popped out of the U.S. Data on a census tract basis, census tracts being the larger geographical areas filled in by the small census blocks, you're familiar with this. The first thing that popped out of that data was that there was a justification for two urban Hilo districts, which Ms. Scarr has already discussed, and one North Hilo, Hamakua district, and let me clarify the misinformation what has been presented by some individuals, the North Hilo district in our plan consists...is that suburban area of North Hilo, plus a 21 % of the Hamakua population. We had to do a split. As we all know, because I have done the same process that you've gone through, lines have to be drawn somewhere. And you still have to meet constitutional guidelines of plus or minus the 5%. We all know that, we've all done the same process. So the question becomes what is the raw data telling you? So the raw data says, two urban Hilo districts, a North Hilo district, two full Puna districts, one full Kailua urban district, a southern district, whatever you want to call it. If you want to call it South Kona- Ka'u or some other name, southwestern Hawaii, but

the name is or the district number is immaterial. The fact is, if the justification in that portion of the Island in the south, southwest are full council seats. And then you get the Kohala and with all due respect to the people of Kohala, they have exactly the same feelings as the same people of Puna, they don't want to see their district fractured. But while Puna can justify two full council seats, Kohala is in a precarious position. Because Kohala has 120% of a districts. That means they can justify one full legal district and 20% of Kohala has got to go legally someplace else. Whether it goes south to the Kona, or it goes east to the Hamakua-Hilo area, doesn't matter. Or even if it is split between those two things. 20% of Kohala legally must go someplace else. So the question when you look at the raw data and you look at the census tracts, and these numbers come jumping off the page at you, the question is, once you accept the basic premise of two urban Hilo districts, a North Hilo district, two Puna districts, a southern districts, a Kailua district, urban district, a northwest area which is in our plancs called District 8, and a north district, North Hawaii which is, then the question is, how do you divide these districts up to meet constitutional parameters. And that's why the...what we call the Hawaii county constitutional redistrict plan which you're not calling the CERG plan which has been called all kinds of things, but its this one (pointing to map), that's the reason we chose to do this.

Now when we did this plan, we did it without regard to any incumbents and where they lived, in fact, most of the incumbents we don't know e\where they live and we don't care where they live. We did it without regard to political parties, I had to explain to someone before this meeting, that I personally am independent. I'm not a Republican, I'm not a Democrat, I'm not Green, I'm not purple. I'm just an independent. I vote for the person that I think is best for the position. And when we did this map, we did not care about

a political party, and in fact in our County Elections in the future they're not partisan. So it makes no differenct. What some of these political persuasion is.

Excepting the basic premise that the County had to be divided up as I have described it, and that Kohala has 20 % too many people to keep inside of one district, we haven't decided where in Kohala to draw a line. And what we chose to do in this plan is to draw the line between North and South Kohala. We...we felt because of the people we knew in the Waikoloa area, Waikoloa being an upscale suburban area was appropriately placed into the North Kona district, northwest, if you want to call it something else , this district here (pointing to map), because of the demographics of that area. We had heard through some of the public testimony that was very important to people in Waimea that Waimea stay together. And so when we drew our line we made sure that we kept all of the town of Waimea together. Unlike the County Commission's plan which divides the town of Waimea which we think is an inappropriate division. Not only inappropriate but unnecessary. You know you can get to ...the difference between illegal and you can do inappropriate and you can do if not necessary. That's a continuum and you want to get to a point of that continumum...continuum is the most reasonable choice. And we felt that to make the most reasonable choice we should keep Waimea as intact as we possible could. And that's why we chose to make the line the way we did. We consider the sociodemographics of the North Kohala area as being close to Hamakua.

Now I need to correct another piece of misinformation you were given this morning. The 79 or 80% depending on which fraction you use, if you round off or round down, this is North Kohala's (pointing of map) district as it stands today, plus 79% of the population of Hamakua which is located on this side of the North and South dividing line,

we kept it with, in this area because its physically closer to Waimea. I'm not saying that people don't work in Hilo, I live in South Kona and I work in South Kohala, that doesn't mean that I should have a representative from South Kohala representing my interests. Where I live should be represented by a person who lives in a same community as I do, not where my paycheck is coming from..

(end of tape)

...There's the Volcanoes and the craters, and the military bases, you know, there's no people. Swapping land around in this area to make it more reasonable doesn't matter, because its emply. It doesn't matter. So what we did when we went to this plan is the first area that we felt really needed major, major help was Puna. If there's a community that has ripped to shreds in the last ten years, its Puna. Just look at the map that you propose, you're doing exactly the same, not exactly, almost the same thing, by taking portions of Puna and putting it in other districts. Those districts today, if you're doing a snapshot, those districts today are dominated by Hilo which is not right. There's no reason to have more Puna dominated by anyone, they are legally entitled to their own council representative. You can't have it both ways, you can't say we're gonna disregard the future growth in different areas, and because in sometime in the future, they're gonna dominate these three districts. You can't use that argument and then say its okay to fracture them and let them be dominated by Hilo. It is no more correct for Hilo to dominate Puna than it is for Puna to dominate Hilo.

On multiple occasions, I've explained to one of your Commissioners, Mr. Van Pernis, that it is no more correct for South Kona to dominate Puna than it is for Puna to dominate South Kona, or Ka'u. First of all, Puna and South Kona are not contiguous and despite the fact this map has

been drawn in this manner, this is completely unnecessary way to cut this map up.

In the map that we have drawn, you will notice that Puna stops and only the Volcano portion, Volcano Village area is attached to Puna. It is only 15 miles from Puna, their centered interest is Puna, but when you get down to Ka'u, those people have a community interest that is more aligned with South Puna as they have said many times in many meetings, not just in Puna meetings, but other meetings. It's time to put these communities together, its time to make sure that these communities are not dragged across the Island. I heard one person say in a private meeting, that well, if you want to continue doing this, why not just drawing lines radiating out from Hilo, and have all the Council people living within a few miles from each other from Hilo and dominating these other sections, That's not appropriate it was a very facetious remark, but its not appropriate. For any areas dominating another area because we draw lines, so they can be dominated. We need to draw the lines so communities of interests stay together.

When we did our preliminary report, we were chastised because we had divided one of the subdivisions inside of Puna. We went back to the drawing board. There is no subdivision in Puna that has any divisions in it at all. All subdivisions are intact. That was one of the goals that we went back and corrected. We followed all the constitutional, State Law, County Charters, and federal case law to do this map the best way we could. We feel this map is better than the County map, and I'll give you a reason, you have a spread currently on this map you're proposing of 9%. You go from a plus 5 to a minus 4%.

The map that we submitted on October 8, has a spread of 5%. 5%, there's a 4% improvement with just this map in the deviation. Right there, there's an improvement. It means

you don't have to cut up, pardon me, you don't have to cut up all these different districts in all of these strange ways, and you can still improve the deviation factor. And we think that that's something that you should be looking at. Why does your deviation factor have to be a spread of 9% when you were given a ...given a map, not a perfect map, but a good map that had a 5% spread six weeks ago. That map is thrown out. There's also been some misinformation presented to you about one of your original maps, that on the west side shows something similar to this. As I said in multiple meetings and to Mr. Van Pernis before this meeting, you cannot consider just one area of the Island. You have to consider the entire Island because one side of the maps may look similar to somebody's map, this side (pointing to map), it doesn't make any difference if you screw the other side of the Island, or you screwed the some other district, you have to be willing to do some compromising, and you have to be willing to consider the best interest of all the different areas. We believe that we've done that. We've never said that this is the one and only perfect map, we've never said that. There is no such thing, and you know it, more than anyone else. You guys have been going through this really horrendous process.

But in our process we did something a little different and that is we got the maps that we did not have the benefit of a computer program. We had to sit down and tape maps all across my living room floor and literally crawl around in these maps and pulled the census blocks off one at a time. And because we did that and I don't recommend it, its very bad on the health of the back, not to say one's disposition, but once you get down to the census block areas, census block levels and you start moving these things around, you can see where there are serious problems in a particular community, as far as the census. For instance, there are blocks in more than one side of the Island, more than one

place on the Island where the census blocks even though they meet the parameters of between 503 thousand. It makes no difference. The blocks are huge geographically, they may have way too many people in them, or too few people in them, and you can't divide a census block without this Commission going and saying to the U.S. government we want to buy this census block, I believe you have that right. You can't do it so you wind up taking a census block that maybe has one or two thousand people in it and having to move it in mass to something else. And we ran into that problem in Hilo, and we ran into that problem in urban Kailua. It's a very big problem. But we did the best we could but the fact that we are in a spread of 5%, compared to 9%, tells us we did something pretty good because or deviation isn't as bad.

Now, there was another piece of information presented by one of the Commissioners here about the south Keauhou area dominating, what we are calling District 6, and the district numbers are immaterial. They can call it "A to F" or "A to J" or whatever you want to call it, it makes no difference, but the blue area on this map. Commissioner Van Pernis specifically say...said that the Keauhou area was going to dominate this entire district because they had more numbers. That's not true. The truth is, those people in that area, that slight bit of that area south of Keauhou have less than 3,000 people. Well, the district itself has over 16, 400 or 500 people, depending who number you want to use, people in it. Ka'u itself has almost 10,000 people in it. So whose going to dominate that district, it doesn't make much difference, but it isn't gonna 3,000 people in Keauhou unless they have a candidate who can convince the other rest of the district that they can adequately represent the

rest of the district. That's what our political process is about, having people campaign each other for the right to represent a district. And numbers isn't the only thing that gets it, after all Julie Jacobson was in Puna and she got everybody…enough people to vote for her that she had this whole district (pointing to map). So its more than just a number situation. So I …I have to tell this Commission that it really pains me to have to come here and correct misinformation and untruthful statements and it really bothers me the community has not really been listened to. I know people say, oh, we're listening but we're being disregarded.

More than that, we've been treated very, very rudely. Our elders have been maligned in public, we're here to give you our input and tell you why we want something the way we want it. Well, they we're right or whether we're wrong. And it is the job of this Commission to evaluate our comments and to use them in the best way possible.

I propose that at this point in time, and I have…ah..this map that has been supported by the a lot of the members of the community, both in Puna and West Hawaii, and I hope Kohala will understand and support this map, as well, that right now with the deviation of spread only of 5% this map is a better map and causes less concern for the communities than the map that is currently proposed by the Commission.

Thank you.

CHAIR: Thank you, Ms. Ford.

Does any member of the Commission have a question for Ms. Ford?

M. VAN PERNIS: I have one question. Um…

CHAIR: Mr. Van Pernis.

M. VAN PERNIS: You agree…seeing from your map, as well as the present council district map that you're in agreement that the West Hawaii districts should include the area all the way up to Saddle Road?

B. FORD: Because of the numbers in North and South Kohala, we had to move 20% of something into another district. We chose because of the demographics in the South Kohala area, to move that area into the…what is currently the North Kona, we call it District 8, northwest Hawaii.

M. VAN PERNIS: Well, I notice that…that the Council proposal, the Commission's map and the proposed map runs the Kona, um…your pink district um…line up to the Saddle Road. Am I right?

B. FORD: Yes, we heard from people that they…that they would like to have that and get the military base into District 8 and we took that into consideration, no people there and we did it.

M. VAN PERNIS: Yeah, there's no people there but the watershed in the…you felt …

B. FORD: Yes.

M. VAN PERNIS: …should be in West Hawaii controlled?

B. FORD: Yes.

M. VAN PERNIS: All right, so at least we agree on that point.

B. FORD: Yes.

M. VAN PERNIS: Thank you.

CHAIR: I have a couple of questions. Um…your proposed map divides the Hamakua judicial district, isn't that right?

B. FORD: Yes.

CHAIR: And um…did you solicit any comment from the folks in Hamakua?

B. FORD: All right.

CHAIR: The other thing is that your District 1, the North Hilo District, reading again the letter of November 6 addressed to me, signed by Peter Martin, actually your name doesn't appear on it, but I believe you're aware of it.

B. FORD: That's right, I believe he sent the letter, but I don't feel competent to comment on a letter written by another person.

CHAIR: Let me quote from the letter, then I'll ask you to comment on that. It describes District 1, the North Hilo District and the primarily agricultural rural district consisting of 21% of southern Hamakua, all of the current district of North Hilo, and portions of South Hilo, north of the Saddle/Kaumana Road.

B. FORD; Right.

CHAIR: Its Saddle, Kaumana, Waianuenue, it all the way to the ocean, isn't it? That dividing line.

B. FORD: Yes.

CHAIR: So I'm concerned when its described as a primarily agricultural rural district when I know that...

B. FORD: There's a ....

CHAIR: North of Waianuenue there's a huge apartment district.

B. FORD; Yes, yes, there's a huge suburban area.

CHAIR: All right. Thanks, I just wanted to make sure that we agree on that.

B. FORD: Yes.

CHAIR: I don't have any other question.

Are there any other...

P. KAHAWAIOLA'A: I do, sir.

CHAIR: Mr. Kahawaiola'a.

P. KAHAWAIOLA'A: I only thing, Ms. Ford, that I have is, I think you and I discussed it in Kona. That the numbers you used for your 5% deviation…

B. FORD: Right.

P. KAHAWAIOLA'A: As opposed to the numbers that we used…(INAUDIBLE)..

B. FORD: Right.

P. KAHAWAIOLA'A: …is your numbers still basically….

B. FORD: My numbers are same…and

P. KAHAWAIOLA'A: Can I have that numbers again?

B. FORD: Yes. The gross numbers that we used with the exclusions of the military and the non-resident students are 147, 877. That's 800 people that are legally required to be excluded, and I just need to report to this Commission, I did give a download of a file from the State that has all three exclusions. Unfortunately, it is not convertible to a data spreadsheet, so I've had to re-request that file to be sent down again. When that file comes down, this number of 147, 877 will drop by some number. Now, this map (pointing to map) all the documentation supporting it, including all the census block data, in hard copy forum was submitted to this Commission as part of the official record. And when we get the new file in a convertible form, so that we can redo it, we will redo this map, I'm sorry, not redo the map, we'll redo the database to include all 3 exclusions, and resubmit it to the County.

CHAIR: Okay.

Mr. Ferguson.

J. FERGUSON: Yes, you stated that we are legally required to exclude those people? What law do you….

B. FORD: State law.

J. FERGUSON: State law states that we cannot count those people?

B. FORD: Yes. And in fact, the State Reapportionment Commission just changed their position on that.

J. FERGUSON: That was military, I believe.

B. FORD: It....3 things, military, non-resident military dependents and non-resident students.

CHAIR: Ms. Ford, in your opinion, is the...does the inclusion of those folks change the proportion of the variations so that in any district it exceeds 5% plus or minus?

B. FORD: The sure answer is no.

CHAIR: Thank you.

Any other questions?

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L. BARTON: I have a motion.

CHAIR: Yes?

L. BARTON: I motion that we um...get the numbers that are on Brenda's and Chucky's map because I think there are a number of issues that are touched on by far too many people and I myself, sitting on this Commission can no longer live with myself, listening to how many people are upset and the overwhelming evidence that ah...although it's not easier for us as a Commission or especially for staff, that I feel we need to have that now.

P. KAHAWAIOLA'A: Um...that's a motion, Mr. Chairman, so I'd like to... because ah...I'd like to second it for a matter of discussion, and I think now would be appropriate for you to have said what you said, Lisa. Reason being, that's what I need to hear, after I heard testimony today.

CHAIR: All right, so there is a second. And the question is now open for discussion.

Mr. Kahawaiola'a.

P. KAHAWAIOLA'A: I would ...now would like to ask the staff, based, just based on this map (pointing to map). If you was to take this map, look at other lines drawn and extrapolate the numbers out of your computer, because I heard Ms. Ford mention that its basically the same software or some kind of, you know, that can be interfaced, or not...couldn't be interfaced, I am now using computer talk, but can you go and take this to a number also, and I think that will satisfy Ms. Barton's motion, so that we can come back, and at the next meeting be able to prepare to do this, or that. Something in that matter, I shouldn't say this or that but at least get some numbers. Right now, we're hearing ...that's my reason for asking, excuse me, Ms. Ford, about the numbers that we use.

CHAIR: Patrick, I believe, Ms. Ford has told us that she provided the numbers, so the numbers are here.

P. KAHAWAIOLA'A: No, I'm...I'm not disputing. You know, I'm just trying to get numbers here...

L. BARTON: I think this is a land description thing...

P. KAHAWAIOLA'A: Yeah.

L. BARTON: And its going to be very time consuming description, um..some of them do follow the same lines and thereabouts, and they won't have that much of a problem. Also they are _____(INAUDIBLE), so I'm....

P. KAHAWAIOLA'A: That's all I would want to ask of the staff for the purposes of discussion.

CHAIR: Let me see if I can um…restate the motion, and with your permission, Ms. Barton, is your motion a request to the staff to produce a map on their equipment with their software that follows the…Ms. Ford's map for lack of a better title. I keep forgetting what it is today, um…and at the same time provided a written legal description that corresponds with that map?

L. BARTON: Yes, I am. The motion is exactly that.

CHAIR: So that's your motion?

Is there a second to that motion?

P. KAHAWAIOLA'A: I would second the motion with the caveat again. I need to go back to the maker of the motion, as you expressed it to provide the legal description, I…that's what is going to be the problem. I would prefer to go and follow Ms. Ford's lines, and go find out what's in the… what's inside the blue, green, and red. And the legal description, I mean, you know, I mean, threats with the lawsuit is a drop in the bucket. I'm just saying if we don't leave the deadline, will then the Court going to come in? I don't know.

L. BARTON: Is the Court going to come in and make a better map anyway?

P. KAHAWAIOLA'A: No, that's my point. That's why I want to address the Counsel. Excuse me the Corporation Counsel.

M. VAN PERNIS: Question. Question.

We certainly shouldn't be operating on the basis of the threats from….

P. KAHAWAIOLA'A: No, no. Mr. Van Pernis, I believe, Mr. Chairman that I have the floor, so that's all I wanted to say. To draw the numbers, bring it back again, and if we don't meet the….I'm….that's what I'm saying, I'm not worried about any threats of a lawsuit, I'm trying to get to

the end of the Commission.. If we don't meet the December 31st deadline does that automatically mean that the Court will do that? Or does it automatically mean that we can go and extend it and get these things done. Again…

M. VAN PERNIS: The Courts will draw a map.

P. KAHAWAIOLA'A: Ah..what?

CHAIR: Excuse me, Mr. Van Pernis. Why don't we let the Corporation Counsel answer that question.

D. AKAMA: I don't know the answer to that.

CHAIR: Okay.

P. KAHAWAIOLA'A: Can you please….I need to know the answer by the next meeting.

L. BARTON: Well, I just want to clarify that the request is not made on the basis of the lawsuit. The question was on something sitting in my mind for a long time.

CHAIR: I appre…

L. BARTON: The last meeting we had, I made the same motion basically, without the land description. I'm just saying, I think we should have done all and we've been putting it off. And I'm just unhappy with myself not having done it sooner, or something like that. Because one out of 9 can't see…that it doesn't have to have a name on the plan. That's all, I'm just looking at logical reasons from within all the people that have voiced their opinion. And actually, it was more so on the guy that came speaking on behalf of Kohala, because…

P. KAHAWAIOLA'A: That's my…

L. BARTON: …because I sat at the meeting and listen to what I thought a majority of people saying Kohala should be stuck…should stay together, whereas, I live in Hamakua and feel very attached to Kohala and the background of the people there, I guess that's where my thoughts were coming from. Sorry.

CHAIR: We're in the mode of discussion now, so, I'd like to ask you a couple questions.

L. BARTON: Yes.

CHAIR: What are the proposals in the map proposed by Ms. Ford, splits the Hamakua judicial district.

L. BARTON: I realize where it splits and I actually like it.

CHAIR: And why is that.

L. BARTON: Well, if I give you my reason, it won't be in accordance to our redistricting. It will be very personal and that is, we have a school district in Laupahoehoe, our boundary ends on the curved bridged. Does everybody know where the curved bridge with the flashing light is...

CHAIR: Ookala.

L. BARTON: ...it's a gulch, called a gulch. Okay. We don't necessarily...ah, always have the population to sustain a school and are threatened quite frequently with ...we've asked the line be moved to incorporate Paauilo, and so bus kids a little further down the road, then they're bussed for about a mile or two. That's not going to change it. These lines won't change that, I don't believe, but that's where, I'm like going. It makes much more sense, that's all.

CHAIR: Let me ask the staff then with regard to the request. Is that feasible, is that possible and in order to meet the deadline, we are going to have one other meeting in which we will, and at that meeting we intend to adopt our final plan. The proposal essentially requires, if adopted, would require the staff to provide us with two alternative plans and we would then be faced with the proposition of adopting one or other. I think you've expressed your opinion with regard to putting together the legal description and the maps incorporating the changes that we've just adopted.

Let me ask you the same question with regard to the plan that's been proposed by Ms. Ford and others. Is it feasible to get those completed before our next meeting and adopt reapportionment plans within out deadline.

P. NAKAMOTO: With the legal description, you're asking?

CHAIR: Yes, with the legal description.

P. NAKAMOTO: We wouldn't be able to get it.

CHAIR: All right. Are there any other questions with regard to the motion?

Hearing none, let me call the question. All those in favor of the motion, signify by saying, aye.

L. BARTON: I wanted to...

P. KAHAWAIOLA'A: I lost tract of the motion.

CHAIR: The motion is...is Ms. Barton's motion. And I believe the motion as restated was that we're instructing the staff to produce maps and the legal descriptions that follow the proposals made by Ms. Ford. Um, so that's the motion before the Commission at this point.

All those in favor of asking the staff to produce those maps and the legal descriptions, signify by saying, aye.

ALL: Aye.

J. FERGUSON: You need hands.

CHAIR: We may.

All those opposed? No?

L. BARTON: Oh, do that one more time.

CHAIR: I think so.

We are going to ask ....

L. BALBERDE: We'll just raise hands then.

CHAIR: All those in favor of the motion, signify by raising your hand? One, two, three, four.

THOSE RAISED IN FAVOR: Jeanne Fuller, Lisa Barton, Pat Kahawaiola'a, J. Fernandez.

THOSE OPPOSED: Jack Ferguson, Mark Van Pernis, L. Balberde.

CHAIR: I have not voted. I will, in defeasance of the staff, vote no. That leaves us tied, Mr. Pavao is not present. Mr. Akama, what do we do now?

D. AKAMA: That means that there's no action, so the motion dies.

A 121

HAWAII COUNTY
REAPPORTIONMENT COMMISSION
25 Aupuni Street, #100
Hilo, Hawaii 96720
Phone: 961 8277
Fax: 961 8673

(Partial Transcript)

LLOYD VAN DE CAR LAWRENCE BALBERDE
Chairman & Presiding Officer STEVEN PAVAO

MARK VAN PERNIS JACK FERGUSON
Vice Chairman JOHN FERNANDEZ
JEANNE FULLER
PATRICK KAHAWAIOLA'A
LISA BARTONTRANSCRIPT OF MEETING
ON
Tuesday, December 18, 2001
10:00 a.m.
at
Hawaii County Office of Liquor Control Conference Room
101 Aupuni Street, Suite #230
Hilo, Hawaii 96720

CALL TO ORDER

The meeting was called to order at 10:06 a.m. by Vice Chair Mark Van Pernis presiding for Chair Lloyd Van de Car who presence was excused. In attendance were as follows:

Patricia Nakamoto, Elections
Gina Haina, Elections
Ed Kozohara, Elections
Al Konishi, County Clerk

Patricia O'Toole, Deputy Corporation Counsel
BrendaLynn Domondon, Commission Secretary

A roll call was taken of the Commissioners in attendance.

Page 9-14:

B. FORD: I brought in...my name is Brenda Ford and I live on 81- 6195 Napoopoo Road, Captain Cook, Hawaii. I'm circulating the final results of the Hawaii County Reapportionment numbers, which ...I hope we're all looking at the same thing. Does everyone have a copy? (A copy is attached as #1)

S. PAVAO: Not yet.

B. FORD: Okay. I'd like to start at the very bottom of this page and kinda work up to the top. If you look at the bottom section, it shows that the U. S. Census gross numbers. These are numbers that the council, I'm sorry, this Commission is using for their numbers. Shows that this Island has 148, 677 people living in the County.

When Charles Flaherty and I turned in our first map on October 18th to this Commission, we had removed the active military and non-resident students which were the only two exclusions that we were able to get from the State which lowered the number to 147,877. We have now received from the State the exclusions for the active military, the non-resident students and the non-resident dependents. So the total...the legally mandated exclusions is 147,806 and that's the number our map is based on at this time. Nothing changed on our map, just the numbers changed. If you go to the center section, you will notice that there are 738 non resident students, 62 active military which you know from previous testimony, those two numbers and the new number is 71 for the non-resident military dependents. Again this did not make any changes

in our map. While most of these numbers come out of the Hilo area, not all of them do, there's a few coming out of the north Puna area, and I mean, very few, less than 10. But most of these are coming out of the Hilo area and you will notice that a number of 871 is a couple of percentage points in the population for a particular district that these would impact. So I would suggest that the numbers you are using again are not legal numbers and you have not reduced the mandetate...mandated exclusions and therefore, your deviations will be off.

The top section of the final numbers for the County using the 147, 806 number, you can see that the allotment per district is 16, 423 and based on that number and the numbers that we have in each one of the areas, based on the exclusions being removed, you can see where our deviation is. We now have a deviation spread of 6% well within the spread of plus or minus 5, for a total of 10%. We are still well within that on the map that we have suggested.

If you have any questions on these numbers, I'll be glad to talk to you about them and answering questions. I am also here when we finish with this one, I have two presentations of two other people.

VICE CHAIR: I note that there is ah...Mr. Boyd who has been signed up (inaudible-speaking away from mike)...is that correct?

B. FORD: That's correct.

VICE CHAIR: Mr. Boyd has testified before and Mr. Boyd's testimony was given in writing as well. So we appreciate that you can testify for Mr. Boyd and you're just going to read his statement, and I point out that we have his statement and it might be part of the record.

B. FORD: I appreciate that you're going to make it a part of your record and I still would like to read it in because that's the request that Mr. Boyd made of me,to read it out loud to this Commission and the public.

VICE CHAIR: All right, please proceed then.

B. FORD: I'll read quickly.

In fact I'll start reading while this is circulating. This is the testimony of Richard Boyd who has requested that I read this into the record. (See Attachment 2 incorporated herein)

(Ms. Ford proceeded to read testimony)

Thank you. Anyone who does not have a copy, I have extras.

VICE CHAIR: I also notice that you have been asked to testify in behalf of Mr. Charles Flaherty.

B. FORD: Yes.

VICE CHAIR: I also want to point out that Mr. Flaherty has testified on several occasions before us so you will read his statement.

B. FORD: I am going to read his statement, I don't have any copies of it, he asked me to read it into the record today and I will leave this copy with this Commission. This statement is written for CERG, Citizens for Equitable and Responsible Government dated December 18, 2001, and it's given to me by Charles Flaherty, to read.

(Ms. Ford proceeded to read testimony, see Attachment 3 incorporated herein).

It is signed by Peter Martin, Sandra Scarr, Stan Boren, David Holzman, Charles Flaherty and Betty Meyerson, all on the Steering Committee of CERG. I guess I

...(INAUDIBLE-SPEAKING AWAY FROM MIKE)....give it to you or....

VICE CHAIR: Thank you, Ms. Ford. Are you finished?

B. FORED: I have one other statement. This is in response to the comment you made at the beginning about the one map that was designed by this Commission that had an urban Kailua district and your persistent comments about how similar that map is to the one that being supported by CERG. While it is true that the CERG map is supporting an urban Kailua-Kona district, the east side of the CERG map bears no relationship to the illegal drawing of 4 districts controlled by Hilo that this Commission is supporting. One more time I'm telling you that you do not have the legal population to support 4 Hilo controlled districts. What you're doing is wrong. I urge you to change this map or adopt the CERG map which shows the legally allowed limit of 3 Hilo controlled districts. Thank you.

VICE CHAIR; Any questions of Ms. Ford? I have one.

What 4 districts on the map, you are saying are controlled by Hilo?

B. FORD: The....your number 1. Your section number 1, like ours is the North Hilo suburban area and the rural areas of Hamakua, your district 2, 3, and 4 and you will notice if you compare that to the CERG map that you do not need districts 2, 3 and 4. You need just 2 districts in that area and North Puna is entirely deserving and has the population to justify its own council member. You have ripped apart North Puna into 1, 2, 3 different districts in order to keep 4 districts controlled by Hilo.

VICE CHAIR: Are you saying then that the District 1 that goes... (inaudible)...to Honokaa to Waipio Valley is controlled by Hilo?

B. FORD: Yes, you have a large suburban population there that is controlling that district.

VICE CHAIR; Thank you.

Page 16- 17:

B. JACOBSON: Good morning, folks. Thanks for having me again and I won't try to be repetitive, so I'll take that to heart certainly. Unfortunately, there was some certain repetition that's been going on at each of these meetings and its been said that all plans....well, I mean, all the plans have merit, I would just say your plan has very little merit compared to the CERG plan. Secondly, I'm sort of concerned, I look at this today and there's no numbers on the plan where they just compare the numbers of population....

VICE CHAIR; Does that mean the percentage from the ideal?

B. JACOBSON: Yeah, I don't see that in today's hand out at all.

J. FULLER: It's the last page.

(INAUDIBLE-PEOPLE SPEAK SIMULTANEOUSLY)

S. PAVAO: Maybe they don't have that page.

B. JACOBSON: Well, they're not available to the public today evidently.

VICE CHAIR: I'm sure its available from the staff.

B. JACOBSON: Well, before everybody testified, it certainly wasn't cause I, again I don't have it here and I got it on time, so. Ah...one more thing...I just have to give you the opinion that the CERG plan certainly does not resemble any of your plans other than what Brenda pointed out that the central Kailua urban district is on one of the earlier plans but again the way they handle Puna so separately despite the fact that we have adequate numbers of people to justify two legal council members to Puna, that has being denied. So I think that is unfair and I think you all know how I feel. Thank you.

VICE CHAIR: Any questions of Mr. Jacobson? Now I call upon Julie Jacobson.

Page 17-27:

Again, we've heard from Ms. Jacobson several times so I hope we can avoid repetition.

J. JACOBSON: Aloha, thank you all for being here. I think a special thank you to, I wasn't at the last meeting but to those of you courageous enough to vote to take a good look at the CERG map at the last meeting. I really thought that was impressive, that 4 of you actually see that so I think that shows that there is certainly quite a bit of dissatisfaction with the map you proposed, so I just start with the fact that I consider your proposal flawed in so many ways that I think you need to just throw it out and start over again and I think the best place to start over again is with the CERG map and I think they did a good job at looking at the needs and analyzing it and seeing the big picture. So that's my basic recommendation to....you have the chance right today to do the right thing. And that would be to reject this map and put the CERG map before you and develop a map if not identical but with the basic main features that they have suggested for that map.

And the other thing I'd like to start out with is that its just very disheartening to me, having gone through this whole process and attended almost all of the meetings, the last one we had a Council meeting which certainly was my first priority to attend to my attend to my Council business, but that each of them, just today for example, the process begins with Mr. Van Pernis from the chair making an opinion which is generally not the appropriate way according to the Roberts Rules of Order to comment from the chair about the article in the paper about Kohala. That certainly shows the bias going into it, this is the section where you hear from the public.

Um... and the second thing is that along...I mean the process, still to this day, you have not had maps that the public can understand available to us at all. I basically had to have the kindness of the press to let me look at theirs and coming into the kindness of the council staff to let me, excuse me I mean the Elections staff to let me come and look at their maps but your actions have not provided adequate information ever throughout this process. And the most recent example of it, you know I provided you with a very crudely made map with cross references that could show the different districts, but your map to this very day that you pass out, you cannot distinquish the lines between two and three on your insert map. And just you just learned just now you did not have the percentages, so the process continues to be flawed, in terms of basic Sunshine rights to have information before the meeting and to be able to study and react and provide input ahead of time. That's never been able to be done on this and um...ah, and then to the basic issues here, and again why I am even telling you we shouldn't be repetitive.

Well, I just want to remind you that it was Mr....it was your Chairman Mr. Van de Car that specifically told me if my

plans were to be...if my proposal were to be considered, well, what I needed to to do was to go to each meeting and present it. So I was told to do that by you, and so I consider it, you know, adversarial for you to start your meeting with the statement that we should not be repetitive when your Chairman directed me to do that. And to the idea that you have considered, you said 11 maps, well, the fact of the matter is we made request to you to actually have the staff draw them up and you have consistently refused to do that, although the 4 of you think you did ask for that at your last meeting. But to summarize that you did that is an incorrect statement. You will with a tie vote you were able to reject doing that process. So its not as though you have given them consideration, you haven't given that map equal consideration because you haven't done the technical work to give it the consideration its due.

Ah...and then now I'm going to go into the Puna problem which started me with this in the first place. As you know, you are both fracturing and packing districts. And as I said before the irony is that the district you packed for me is...increases my likelihood of getting elected in terms of the results of the last two elections and analyzing the precinct data. So I suppose I should be saying thank you but to me justice is more important. By, you know, if I get by a car today, I want to know if I did the right thing and stood for justice no matter what it does for my political chances. Um...and then so you packed it and then in terms of the political encumbrance. So I believe you generally have done that for other districts although I don't know the specifics of the precinct voting patterns. But more, even more critical to me is the fact that you fractured the Puna community and you have basically put Puna people in one controlled by the Hilo districts. To debate what is controlled by...the very process that the State rejected canoe districts based on the idea that that areas are very

different, Maui and the Puna areas and Hilo, and they realize that they had the majority of the population on the Maui side and I believe that's on the Maui side I think was 58%, they realize that that was not allowing for proper representation, that would be too much of the borders would be in one area and not the other And so that's what you're doing with your arrangement with 3 and 6. You are splitting...and I just want to remid you that the Puna district border with Hilo is roughly near...its roughly near the 5 mile marker near Macadamia Road on the highway.

So your map draws the 3 and 6 lines way up on the Kulani Road on the makai side of the highway. And Peck Road, Peck Road in on the 16th mile marker you have 10 miles of Puna along the highway in on the mauka side, and there are many subdivisions in that area. There are many people that are affected by this. You have fractured the town of Mt. View. You have Mt. View School in the 6th District on the makai side of the highway and just a few hundred feet up the road, you have Mt. View Post Office in the 3rd District because its still Hilo side of Peck Road. So you have split the town of Mt. View, having the Post Office a few hundred feet from the school and in different districts is just wrong, this town is fractured.

And then I come to the point that I made earlier that I don't think you ever addressed, and that is this whole issue of the fact the way the resources and the way County government is currently organized is around judicial districts, the State judicial districts, our fuel taxes are led by that, our figures on property tax are described in terms of the judicial districts. Our Parks and Recs are organized by it, and our Public Works Department. And so this is....so when you make them drastically different from those, I mean you have the population range of 17 some hundred people to 47 hundred some people. So each district of course is going to

be one but to the extent that you can not divide them up, not throw 3 different districts and not mix them up like this, you would be able to do a better job of keeping tract of recourses and insuring the equity of the resource dispersal. Um...and....I guess these are just my main points and then, of course, the same factor that you have never address the length of the 6th District, and you've also created a kind of interesting phenomenon that you might not think about that you can say that it is technically contiguous, all the way down to Kealakekua Bay, all the way up to the back corner of Hawaiian Acres on the 9 and G road. But in order to travel on a paved road, you know, and not take another extra hour of travel time bouncing around on the back roads, you have to leave the district in the Hawaiian Acres end at about the 10 mile marker and drive almost 6 miles...well, around between 11 and 10 and 11, and up the other one at 15 and 16, but you have to drive 5 miles on...to drive on pavement you have to drive 5 miles outside of the district to get back into it again at the one end. So if you flew by magic carpet, I guess that's contiguous, but if you travel by road, you have to go out of the district and back in it again. And you may have a few spots where you have to do that for a short distance. But you don't have anything glaringly like that, like you do in the 6th District. And so I just urge you to do the right thing because it is just a foregoing conclusion, you will face this in court and I think that as Brenda has pointed out, it is just a terrible waste of taxpayers money and a terrible distrust you give to the public when, you know, we all know that the vast majority of the public had told you this plan doesn't work, and the vast majority of us have come together on another plan, and you know, that's what 90 some per cent of the public has told you particularly interestingly the public that comes here in person to tell you this. The public that goes to every meeting and tells everybody what they think out front, that

part of the public is here, and has been here. The public that you get letters from that you read their written testimony, you know, maybe some of you have said, well, there's a whole bunch of that, and I suppose we can go and look at your minutes and try to sort out well, just how much of that is there compared to this. But in terms of your meetings and the process where we worked ostensibly supposed to present our testimony, its been clear and decisive. And so again, I urge you to just do the right thing today, its not too late and each of you have the intelligence and if you, and I think if you listened to the real reason behind all of this, you'd see that that what you're doing is against the public interest and it's a very deep and disturbing thing to....to prevent justice that will affect us for 10 years. And its very hard to, just as I thought we did it wrong the first time in 1992, and all we're doing is exasperating that and its very hard to change tract so if we have to have another ten years of this wrong what's made worst than what we what we already have, you know you are really undermining the public trust, the public confidence in government, and we certainly don't need that with the scarce resources and the difficult problems we have all the way up to the international level . Its time to...if you want to show solidarity with the people of your island you know what to do, and that is to reject this plan and to create a plan, if not identical to largely similar to the CERG plan the Hawaii Constitutional plan.

Thank you very much.

VICE CHAIR: Any questions for Ms. Jacobson?

S. PAVAO: I have.

VICE CHAIR: Mr. Pavao?

S. PAVAO: This is a point of clarification, Ms. Jacobson. I heard you say something, and I want to make sure that I

heard the right thing, but are you saying that 7 to 10 people testified at the public hearing is the vast majority? I heard you say that we heard from the vast majority of the public and the vast majority of the residents of this island.

J. JACOBSON: No, I didn't say that the vast majority actually came to the meetings, I'm saying in the meetings. For example I think the most notable one is the Puna meeting, where 26 people testified...in fact I don't think we were looking at the CERG plan but it's a plan that my husband and I proposed, and that was...actually what I remember is that even no one that I've heard from the public came out and said: we love this plan, let's do it. The most that I've heard was, even this, the majority of the people saying was presently seated council members saying: we can kinda live with it, we trust you doing a good job, we support what you're doing. And then some of you of the public who were not council members said: well, take a good look and you're looking at this and then some council members to their public testimony to you did not take a specific position.

S. PAVAO: Wouldn't you....

J. JACOBSON: And that's what I call that when you have um..in terms of the people who came to speak here, I call that the vast majority...even with the people who came to....

S. PAVAO: Wouldn't you...

J. JACOBSON: ...even with the people who came to....

S. PAVAO: When you say its true that you know, in Puna mauka and Puna makai you did numbers with 30,000 people and 26 people speaking at a public hearing still is not indicative of the vast majority of the residents of the district.

J. JACOBSON: I'm saying that the conclusion you should draw, the public testimony you got leads you to this being what the people supported. The only way I would back out from that is if you....excuse me, what am I...those people should have come who don't approve of it, and I don't know why you have to cut...why you have to think you have to wonder about what people ah...people could've come to all these meetings, people could've read all of this.

S. PAVAO: Well, I don't think the issue is wondering what the other people are saying or not, we all live in districts, we all talk to people in our districts day in and day out and they have different opinions as opposed to just hearing from public hearings we have input from other areas as well.

J. JACOBSON: Ah yes, and I would assume that they should be on the record and...

M. VAN PERNIS: I think we covered the subject.

J. JACOBSON: And I'd like to say this, but there's literally hundreds of people...

M. VAN PERNIS: Excuse me, we have a question pending. Ms. Jacobson.

J. JACOBSON: ...who have told me that they don't like the plan....

M. VAN PERNIS: Ms. Jacobson, please. We have a question pending.

Any more questions from the Council...excuse me, the Commission?

L. BARTON: I have.

M. VAN PERNIS: A statement or question?

L. BARTON: A statement to what she's saying.

Clearly, I just want to say that this morning when you said, "a lot of people have come out", I do agree. A lot of people have come out in support of our plans, and they also have to say that its been my experience, and I think you may be aware of this that on this Island is, when you have the meetings those that don't come are basically saying, they're not...there's not enough interest, they're not opposed, because when they're opposed, that's when they come. That's all I wanted to say, and so as far as support for the plans, it's the lack of support we are hearing of the plan right now. The majority of not supporting is staying at home and saying and saying: whatever that's fine.

J. JACOBSON: But I want to comment that you cannot make the leap that the majority are staying home, has studied the issues, knows about it, has an opinion about it.

M. VAN PERNIS: As I understand it, you are now in favor of the CERG plan and are basically not advocating the plan that you and your husband submitted earlier in the proceedings?

J. JACOBSON: I'm supporting the CERG plan. There may be details where one plan has some benefits and another plan has some benefits, to summarize that I think particularly for the Kona area, I did not consider that I have the expertise, and I'm sure theirs is vastly improved in terms of their intimate knowledge of that area.

M. VAN PERNIS: So we should take your testimony in supporting the CERG plan...

J. JACOBSON: Yeah.

M. VAN PERNIS: ...and basically the drawing that you are...the earlier plan that you and your husband submitted.

J. JACOBSON: Well, that's not the issue to me to withdraw. I gave you the proposals. Now my point is that their plan is a desirable plan, a very good plan, and I support it.

M. VAN PERNIS: Thank you.

Any more questions of Ms. Jacobson? Hearing none, I'll next call Mr. Mikahala Roy, please.

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A. KONISHI: Good morning, Mr. Chairman, good morning. Commissioners. For the record, my name is Al Konishi, and I have spoken to you before. For those in the audience, I would say this again.

Just for...to disclose where I am coming from, I am a political appointee appointed by the Council members. Having said that, yeah, I also want to say that according to the Charter, my role is to provide you with logistical support and as you know, as a political appointee, one of the things that I have done is, I have gotten out of the way and made sure that myself and the other political appointee of the department, Mr. Ikeda, we have had nothing to do with the drawings of the line. In fact we kind of banned ourselves from the room where Mrs. Nakamoto and Mr. Kozohara are doing the lines. I just want to say that just to clarify that for the record. Having said that, you know, I hate to be the bearer of bad news, okay. But this morning I had a chance to check with Mayor Kim outside his office, and we were just shooting the breeze, and we talked about the concept of telling it like it is even though it is not popular. So I'm sorry to disappoint a lot of people in the room but as a person providing you with logistical support I gotta give you some bad news.

First of all, the deadline that's imposed on you is December 31st, that's 13 days away. That's is not a deadline that I

made, its not a deadline that staff made, its not a deadline the HGEA made, the Council or the Mayor. This is a deadline that the people of this Island voted for on...in November of 1990. This deadline has been known, therefore for 11 years, from November 1990 to now. This December 31st deadline is known.

Second thing. This deadline is not a matter of convenience for the staff or for myself or the candidates. State Law which no one in the County has the authority to supercede. It says that Mrs. Nakamoto and her staff have to have maps, descriptions, nomination papers available for candidates in February. Okay?

Here's the bad news. If you make any major changes to this map that is behind you, they are not going to make the deadline. Now I'm not here to ask for your sympathy, but we have our workers working an average of 14 hours a day. They simply cannot put more hours in the day and make this deadline. They simply can't. In fact, Mrs. Nakamoto quite does not want me to reveal this. But we are in a situation now where we can't finish it without her, she's facing a situation where she's going to lose accumulated vacation time because we just don't have enough time to do anything else. So today is, I know I heard a very, very nice presentation by the previous speaker about delaying...I'm sorry, I gotta break the bad news to you. We can't do it. If you're going to make the deadline of December 31st, you gotta go today. And you know, again, I just want to also state something for the record, because I heard Mrs. Ford mention this and I read it in the article.

Just for the record, folks, you know, a lot has been said about what is Constitutional and what is not. And Mr. Ferguson, Mr. Van Pernis are legally trained. Burns vs. Gill is not the controlling authority in this Reapportionment

situation. Burns vs. Gill was decided in 1970. I am only saying this because, you know, I want to reassure you Commissioners. Burns vs. Gill was decided in 1970, the issues it had were whether or not State legislative districts would cross over the water. Also, they talked about the issue of multi-member districts. In Burns vs. Gill , the Hawaii Court...oh, I'm sorry./..the U. S. District Court I believe talked about the history of Reapportionment in Hawaii. In the recitation of the history, they talked about how a committee of the Constitutional Convention went ahead and did their reapportionment plan. And in that recitation they mentioned the factors that, that particular committee used. Now, Mr. Van Pernis and Mr. Ferguson know that a holding by the Court, in other words, its something that is put right to the Court, the question is, you know, can they do this or can't they. That is the ruling in the court, in the case Burns vs. Gill does not stand for the proposition which I've heard them alluded to. I think, in my opinion, the controlling authority is the case of Kawamoto vs Okata which took place in 1994 in which residents in Waipahu were upset because they said their district was cut into three different pieces. Now, that's not what's quite on point, but I think that would have more authority than Burns vs. Gill. In fact, there are two excellent articles on reapportionment in Hawaii. One being called The History of ReApportionment in Hawaii, the other one is How to Challenge a Plan or How to make a Plan. One appears in the Hawaii Bar Journal and one appears in the University of Hawaii log. Burns vs. Gill is hardly cited. Okay.

I just wanted to mentioned that in case some of you wondered whether or not there are constitutional questions about the particular plans that you worked on. Again, you know, as a political appointee, I don't want to get into the specific plans as to whether or not, I think they are

constitutional. I just wanted to make that clarification that and you could, you know, if you want to consult with your attorney, you can do that, too. But in my opinion, Burns vs. Gill is not controlling, its Kawamoto vs. Okata. Anyway, I am sure, you know, again in keeping my effort to keep this apolitical, I'm gonna leave the room after having stating this. We have excellent staff people, on the question of integrity etc, they can fill you in more about some other columns they would have if you made any major changes to this map here. Again, I want to make it clear. Its not because I am supporting this map, whatever map you have behind you today, what I'm telling you is, if you make major changes, whether it may be the CERG map, Mrs. Jacobson's map, maps 1-9, you make major changes today, you're gonna have a very difficult time making a December 31st deadline. And again, that's not a matter of convenience for us. Its State Law and it's the County Charter.

S. PAVAO: May I ask Mr. Konishi a question?

VICE CHAIR: Any other questions Commissioners have for Mr. Konishi?

S. PAVAO: Can you briefly tell us what are the Court's fiindings in Kawamoto vs. Okata?

KONISHI: Okay, in Kawamoto vs. Okata, Calvin Kawamoto who was then the head of the Neighborhood Board, now he is a State Senator, said that Waipahu had been split up and it was discriminatory, violated the people's equal protection rights, etc, etc. Now what the Court did there, the Hawaii Supreme Court, is what most Courts do, in gerrymandering...alleged gerrymandering cases. Most times, unless a Commission had done

something so outrageous, they would not get involved, because Courts don't like to draw lines. Okay. So they have looked at the first issue. They said are there huge population deviations? Okay, and the answer was no. So therefore... then the Courts said, okay, if you're basically saying that the people of Waipahu formed this group that is somehow getting their rights discriminated against, so they broke it down a couple of ways.

The first point was is there an identifiable group? And the feeling of the Court was, Waipahu is so diverse in ethnicity, in socio-economics, in occupations, that it is so nebulous, that what group are you discriminating against? And the Court noted that most times on the mainland, where people allege discrimination, is basically racial discrimination, and those things are readily identifiable. Okay. But in the case of Waipahu, Calvin Kawamoto was just saying, well, we don't like the fact where they split up three different ways. Also, the Court then said, what is Waipahu? You know. Where does Waipahu begin and end. What about just about got this case memorized. What about Village Park? What about SeaView? What about the community of Waipio? Okay, so the Court say, gee, Cal you can't even show us on the map where Waipahu is. Okay.

And I...I can't remember the last point but so what the Court did was found that the City and County Reapportionment Plan was valid, it was not...it did not constitute gerrymandering, and it did not discriminate against any so-call unidentifiable socioeconomic group.

Again, you know, Mr. Pavao, if you're kinda interested, there are some excellent law review articles on the subject, they are kinda understandable, even though they are drafted by lawyers. Usually I don't recommend yhings....or lawyer's right but just basically just what they decide in Kawamoto.

S. PAVAO: Thank you.

VICE CHAIR; Any more questions of Mr....?

P. KAHAWAIOLA'A: I do. And my only question to Mr. Konishi, is what's the bad news? So what's the bad news, you came in with some news. What's the bad news? I guess, you're giving me the idea that we knew the deadline was ....

A. KONISHI: No. I know....

P. KAHAWAIOLA'A: ...the 31ST of December, so I mean, I just hope that...and I only speak for myself, I just hope that ah...I knew the deadline was there, I know the crunch time, and the knew the staff had...I'm not going to put....be prepared to put the staff under that kind of situation. If someone's going to lose big time, and they're working 14 hours, and don't get so see, you know, their families during the holidays, by the same token, that's why I'm saying, that in my opinion, there's no bad news. We're prepared, you know, we gotta do what we gotta do, we took it on and ah...or I took on this job...ah assignment to do this till December and make sure that ah..we can come and constitutionally say, you know, the threat was there, and the threat is still there. I heard it twice tonight...today, that it may be resolved in the Courtroom. So be it. If that's the way its going to be done, this is supposedly, this is America, and that's the Constitution that they prepared to, to, to use, and I heard the 14 Amendments and I put a record, and I'll make it clear for the record, as a native Hawaiian living on Hawaiian Home Lands, the 14th Amendment does not apply to the Hawaiian Homes Commission Act. I can make that categoric and clear. It does not apply to the native Hawaiians that live... that are living under, that are qualified under the Hawaiian Homes Commission

Act. That's a sad case to mention, but its...its clear in this County, so I don't want to start that...go into that tangent, however, I am prepared just to do what is fair for the rest of them because not all of my ohana, my family, qualifies as native Hawaiians, and therefore, they live in separate parts of this Island. So I just needed to make it clear, I just thought it as a matter of ah...to break this seriousness that you have. I didn't hear any bad news, I just heard that we just have to keep it going.

A. KONISHI: Well, you know, I want to thank you, thank you, Patrick. I just want to review another conflict I have, Patrick and Mr. Balberde. No, I don't have a prejudice towards Keaukaha so I'll reveal that for everyone now. I say that because I know a lot of, you know, people are not happy in the room, and a lot of statements have been made but the reason I said bad news is because at that other meeting, I want to point out that yourself, from East Hawaii, from Keaukaha, the great community of Keaukaha, Mr. Balberde from Waiakea, Ms. Barton from the eastern side. You guys were the ones who voted to take a look at the CERG map. So when I say bad news, I know you guys did your best to try to get their concerns out, you guys didn't have the votes. And when I tell you because of that track record of being open like that, I just wanted to tell you that even if you wanted to look at it at this point, I'm sorry, its just too late. So again, because you guys had voted for that CERG thing the last time, I just wanted to throw that out for you.

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J. FERGUSON: ... I feel that what we have done here is nothing unconstitutional, as I said, people may differ. They feel differently about what we have done, and they have their options and I encourage them to use them. Not just for the sake of saying, gee, we lost, lets go to court, but because

you truly believe in what you're doing. I don't think that there's anyone, anyone who is proposing these different plans in what we have talked about here on the Commission, has any particular political agenda in mind, I think most of these people believe that their idea is better than ours. And they're certainly entitled to that opinion. I would like to state for the record, that I personally did consider all the maps that we presented including the CERG map and Ms. Jacobson's map, and I know that the other Commissioners did, too. They were discussed here at the meetings and we did hear all of your arguments, you were not shut out, we listened to whatever you had to say, we just don't agree.

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VICE CHAIR: So then the motion will be so amended. Is there any further discussion? ...

VICE CHAIR: All right, I would then ask that all those in favor of the proposed...excuse me... All those in favor of the 2001 Council District Plan as presented in Mr. Pavao's motion, please raise their hand.

ALL HANDS RAISED.

I note the unanimous 8 votes. Mr. Van de Car, of course, being absent.

Thus the plan and the motion passes, and the plan is in effect.

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United States Election Project

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Enhancing Competitiveness in Redistricting

(Partial Text)

One of the fundamental characteristics of democratic government is that voters have a meaningful choice among candidates on the ballot. The 2002 congressional election sorely tested the degree of democracy in the United States. Pundits widely reported the 2002 congressional elections as the least competitive in modern history. Only 40 – plus or minus a few – out of 435 House races were considered close enough going into election night that the outcome was not known with a high degree of certainty.

How can the country regarded as leader of the free world host legislative elections whose competitiveness is nearly on par with one-political party dictatorships such as Cuba, old Iraq, Libya, and the old Soviet Union? The answer lies in how the districts are drawn. Districts are redrawn every ten years in a process known as redistricting. Only in the United States do the politicians have so much say in how their districts will look. Democracy is turned on its head during redistricting – instead of the voters choosing the representatives, the representatives choose the voters. Naturally, they choose voters that will further their political goals, not enhance democracy.

How to create competitive districts? To answer this question, the goals of those drawing the districts are examined here so that their motivations may be understood, and why they prefer to create non-competitive districts. The genius of the federal system of the United States has produced multiple redistricting criteria and processes across the fifty states, and thereby provides examples of what does and does not work to enhance competitiveness in redistricting. These are broadly defined into: redistricting criteria, redistricting procedures, and electoral procedures. Each item within these categories is briefly described below, including a discussion of its effect on competitiveness and prospects for reform.

Overall Recommendations for a Commission System

A proposed redistricting process that will produce competitive elections is a commission system. These recommendations are based on the Arizona commission model, with lessons drawn from elsewhere...

3. The selection procedure should insulate members from political influence, while at the same time providing for partisan representation on the commission. Members should not be allowed to run for election in the districts they create...

8. The commission should have a competitiveness requirement in drawing districts, as so much as that requirement does not conflict with other legitimate goals of redistricting, such as population equality, adhering to the Voting Rights Act, etc...

9. The commission should not be allowed to know the location of incumbent homes when drawing districts. Information regarding partisan voting is necessary, however, in order to gauge the competitiveness of districts...

What is Gerrymandering ?

A special word has been devised to describe manipulating district boundaries to affect a political outcome - gerrymandering - in dubious honor of a state legislative district proposed by Massachusetts Gov. Elbridge Gerry in 1812 that bore a striking resemblance to a salamander. Redistricting affects the careers of politicians and the representation of political parties and racial groups. Incumbents, political parties, and racial groups all have a role in the redistricting process, so understanding the motivations of these players and how their motivations interact with one another is important to understanding how the redistricting process operates in practice and shapes outcomes.

The three types of gerrymanders are:

- Partisan gerrymandering: The goal of a partisan gerrymander is to gain partisan advantage through redistricting. Partisan gerrymanders occur when one political party controls the entire redistricting process. For a state legislature, the goal of a partisan gerrymander may be to secure majority control, while for congressional districts, it may be to maximize the number of seats a party will win in a state. These two goals are subtly different, but have generally the same effect on redistricting.

The strategy behind the ideal partisan gerrymander is to "pack" and "crack" supporters of the opposing political party. Opposition supporters are "packed" into extremely safe districts in order to waste their votes in pre-determined elections. The gerrymandering party efficiently distributes their supporters across the remaining districts, placing just enough in each district to comfortably win, but without stacking itself. Opposition party supporters are "cracked" across these districts, wasting their votes in elections that their party's candidate cannot win.

Districts created in a partisan gerrymander tend to be non-competitive. The opposition party's districts will tend to be extremely safe while ironically the gerrymandering party's districts are a little less so, so that their supporters may be more efficiently distributed throughout a jurisdiction. Sometimes the practicalities of the political geography of a state will limit the partisan gerrymander, enabling the creation of a few competitive districts currently represented by the opposition party that the gerrymandering party hopes to pick up in the following elections.

- Incumbent protection gerrymandering: The goal of an incumbent protection gerrymander is to secure reelection for incumbents. Often this form of gerrymander represents a compromise between the two political parties, a situation which is forced when one party does not exclusively control the redistricting process.

Redistricting is one of the few political processes that lends itself to bipartisan compromise. Two representatives from different parties, whose districts adjoin, are willing to make mutually beneficial trades. A Democrat representative is willing to swap with a Republican representative, Republican voters for Democratic voters. Both representatives gain electoral security through this trade. Incumbent protection gerrymanders tend to produce the least competitive elections.

Racial gerrymandering: The goal of racial gerrymandering is to secure the election of candidates of choice of a particular race...

None of these three types of gerrymanders results in competitive districts. Incumbents prefer a certain and decisive win, not only to retain their job, but also to frighten off future challengers. Political parties prefer certain

victory to the possibility that the other party will win elections. Racial groups prefer their candidates win with certainty, rather than the chance that they will lose. As these interests often have control over redistricting at some point in the process, the deck is stacked against the creation of competitive districts...

Enhancing Competitiveness in Redistricting...

Redistricting Criteria...

2. Compactness

Description: Compactness is another generally accepted criteria for redistricting that is often encoded into state constitutions. Together with contiguity, compactness reflects the notion that districts should be composed of a tightly defined area so that representatives may be able to more efficiently communicate with their constituents. "Bizarrely" (in the words of Justice O'Conner) shaped districts are an indicator of political intent in redistricting, as political concerns are most visible in districts that incorporate within their boundaries certain areas over others. The reverse is not necessarily true, as a compact district may still be cleverly drawn to affect a political end...

The U.S. Supreme Court (see Bush v Vera) and state Supreme Courts have considered compactness measures in deliberating the shape of districts, but have not officially adopted a measure, relying instead on "eye-balling" of districts to identify non-compact districts.

Competitiveness Effect: The effect of a compactness standard is dependent on the political geography of a jurisdiction. If voters in a jurisdiction are neatly distributed into communities from which compact districts may be drawn around, a compactness standard may decrease competitiveness. If the political landscape is a heterogeneous patchwork of disparate political

communities, then forcing the combination of communities would likely lead to more competitive elections. It is possible that non-compact districts could achieve the desired mixing of political interests, too. Furthermore, compactness is not a panacea, since cleverly drawn compact districts may still be non-competitive.

Prospects for Reform: The devil is in the details. Compactness has multiple definitions, so one would have to be chosen, and it has detrimental effects on other redistricting criteria (e.g., respecting communities of interest and the Voting Rights Act.). Even so, many states explicitly require districts to be compact without specifying a standard.

3. Respect for Communities of Interest/Existing Political and Geographical Boundaries

Description: The requirement that district boundaries follow existing political or geographical lines, or respect identified communities of interest, is sometimes found in state constitutions. These requirements address the heart of the concept that contiguity and compactness together hope to accomplish: basing districts on communities with a shared interest. These are typically separated into two separate criteria, one regarding respect for existing boundaries, and another respecting communities of interest. The former are easy to identify on a map, the latter require states to hold citizen meetings in locations across a jurisdiction in order to determine where communities of interest exist. Sometimes communities of interest correspond to existing boundaries, but this is not always the case as communities of interest may sometimes be bounded by something as mundane as a road.

Competitiveness Effect: Communities of interest are by definition, communities with a shared common interest, and as such tend to be politically homogenous.

Competitiveness requires a mixture of interests to spark debate and exchange of ideas during political campaigns. District boundaries that separate communities based on their shared interest tend to reduce competitiveness.

Prospects for Reform: In Miller v Johnson, the U.S. Supreme Court identified respect for communities of interest as a legitimate goal of redistricting. The criterion is also codified into some state constitutions...

5. Equal Population

Description: The United States Supreme Court ruled in Reynolds v Sims and Wesberry v Sanders that state legislative and congressional districts must be of equal population size.

In subsequence rulings, (such as Karcher v Daggett) the Supreme Court has ruled that congressional districts must have perfect equality of population; though small deviations have been allowed in some states if there is a compelling state interest, for example in 1991 Texas had a 0.82% deviation in its 1991 map that was upheld by the courts while a Kansas plan with 0.92% was rejected.

For state legislative districts, the United States Supreme Court has generally allowed larger deviations, upwards to 10%, from the smallest to the largest district; larger deviations are permissible if a jurisdiction can again prove a compelling state interest to do so. Some state constitutions have specific equal population clauses in their constitutions, and State Supreme Courts may interpret the state constitution to require less than a 10% deviation. For example, the Illinois Supreme Court has interpreted that state's constitution to require a 1% population deviation for state legislative districts.

Competitiveness Effect: Initially, the equal population mandate perhaps did more to increase competitiveness than any change in electoral laws in the history of the

United States. Prior to equal population requirements, some states had not redistricted for 60 years or more, creating a "creeping" gerrymander that favored interests representing politically homogenous rural districts.

An unintended consequence of the equal population mandate is that redistricting now must occur at the beginning of each decade with the release of a new census of population. As redistricting tools have become increasingly sophisticated, those in control of redistricting have been able to manipulate the process to produce uncompetitive districts.

Prospects for Reform: None at the Federal level. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment as providing the guarantee of equal population districts.

State constitutions could be changed to increase equal population with regards to state and local redistricting, but it is not clear what the effect would be on competitiveness. Population equality constrains gerrymandering, since there are fewer maps that can be created with equal population. However, there may exist maps with sizable population deviation that are more competitive than any map with zero population deviation. Given the uncertain impact on competitiveness, a strict equal population clause should be omitted from a state constitution in order to allow small flexibility in enhancing competitiveness in districts and other redistricting goals (e.g., incorporating an entire city within a district that otherwise would require a split of that city – a split that would likely be made along political considerations).

7. Incumbent and Partisan Blind Redistricting

Description: Incumbent and partisan blind redistricting criteria seek to remove political considerations from redistricting. In the case of incumbent-blind redistricting,

those drawing the maps cannot know the location of incumbent's homes. There are two sorts of methods to require partisan-blind redistricting, either through limiting the use of election information in the course of redistricting, or through language that states that redistricting should not be used to favor one party over another.

Competitiveness Effect: Incumbent and partisan blind redistricting criteria improve competitiveness by limiting these two powerful interests – incumbent and partisan – both of which prefer safe districts.

Limiting the use of election data during redistricting, however, may have a negative effect on competitiveness, since these election data are necessary to determine the competitiveness of a district, and how to improve that competitiveness.

Prospects for Reform: The U.S. Supreme Court has implicitly acknowledged that incumbency and partisanship are legitimate goals of the redistricting process, though the court has ruled in Davis v Bandermere that there is a limit to partisan gerrymandering (though the court has only once overturned a plan based on partisan gerrymandering, and that plan regarded at-large districts versus a districting system in North Carolina). There is much speculation regarding Vieth, the most recent partisan gerrymandering case yet to be decided by the Supreme Court. However, the Court has never ruled that limiting these interests in the course of redistricting is unconstitutional, and indeed, some states have adopted such redistricting criteria.

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REDISTRICTING CRITERIA FOR HAWAI'I COUNTY

By Charles Flaherty and Brenda Ford

1. No district shall be drawn to unduly favor or penalize a person, political faction, or incumbent.
2. Districts shall be drawn that are as compact as practicable using current computer technology.
3. All parts of the district shall be contiguous to the district. A resident shall not be forced to leave the district in order to reach another part of the same district.
4. District lines shall, where possible, follow permanent and easily recognizable features.
5. Nonresident military, nonresident military dependents, and nonresident students shall be excluded from the permanent population base used for calculating "ideal" district numbers and deviations.
6. Districts shall have approximately equal, permanent, resident populations, as required by applicable constitutional provisions.
7. The total deviation for the entire redistricting plan shall be less than 10%.
8. The maximum deviation within a district shall not exceed plus or minus 4.99% of the ideal district population. An ideal district population shall be the total number of permanent residents divided by the number of Council Districts.
9. The "one person, one vote" principle shall be used.
10. "Standards of fairness" principles shall be part of the plan.

11. There shall be no gerrymandering for any reason.
12. There shall be no packing (also known as stacking) of racial minorities or political parties in districts.
13. There shall be no partisanship in drawing district boundaries.
14. Communities of interest shall be kept together, if practicable.
15. There shall be no fracturing (also known as cracking) of racial minorities or political parties.
16. There shall be no fracturing of communities of interest, if practicable.
17. Drawing bizarre district shapes shall be avoided.
18. District boundaries shall be drawn without regard to incumbent's residence, incumbent's ability to run for re-election in their current district, or whether the incumbent faces another incumbent for re-election.
19. Socio-economic factors shall be identified, documented, and included in the redistricting plan. If any factors are not used, the reasoning for such non-use shall be voted upon and documented as to the reason(s) why.
20. Keep socio-economic groups together, if practicable.
21. Documented, high-growth districts shall be drawn to receive the most negative percentages of an ideal district population so as that district continues to grow between census years, the deviations will be equalized with other districts.
22. All deviations shall be justified publicly before the final meeting of the redistricting agency and be

included in writing with the submission of the final plan.

23. To determine the number of Council Districts an area justifies, add the census tracks for each area together and divide by an "ideal" district's population. Round fractional portions of such districts to the nearest integer to determine the number of Council Districts required for that community.

24. If a population of residents must be moved to a different district to equalize deviations, move the entire subdivision as a unit, if practicable.

25. Submission of alternate plans to the Reapportionment Commission that are legal, meet the above criteria , and have lower total deviations, shall be selected for the final plan unless the redistricting agency can alter its plan to achieve lower deviations than the alternate plan offered. Documentation for the reason the alternate plan is selected or rejected shall be in writing.

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How to Draw Redistricting Plans That Will Stand Up in Court

Peter S. Wattson
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I. Introduction

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following the 2000 census so that you may learn how to draw redistricting plans that will stand up in court.

But, before I get into the cases, I think it is important to clarify some terms I will be using and to explain how the redistricting process works.

A. Reapportionment and Redistricting

"Reapportionment" is the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does.

"Redistricting" is the process of changing the district boundaries. The number of members per district does not change, but the districts' boundaries do.

The relationship between reapportionment and redistricting can most easily be seen by examining the U.S. House of Representatives. Every ten years the 435 seats in the House of Representatives are reapportioned among the 50 states in accordance with the latest federal census. As the population of some states grows faster than that of others, congressional seats move from the slow-growing states to the fast-growing ones. Then, within each of the states that is

entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. The state is redistricted to accommodate its reapportionment of congressmen.

Reapportionment, in the narrow sense in which I will be using it here, is not a partisan political process. It is a mathematical one. The decennial reapportionment of the U.S. House of Representatives is carried out in accordance with a statutory formula, called the "method of equal proportions," established in 1941. 2 U.S.C. Sections 2a and 2b. It is not subject to partisan manipulation, except in determining who gets counted in the census. The decision of Congress to use this particular formula, rather than another, has been upheld by the Supreme Court. Dept. of Commerce v. Montana, 503 U.S. 442 (1992).

Redistricting, on the other hand, is highly partisan. This is because, in redrawing district boundaries, the drafter has such wide discretion in deciding where the boundaries will run. Creative drafting can give one party a significant advantage in elections, as I shall explain in a moment.

B. Gerrymandering

The process of drawing districts with odd shapes to create an unfair advantage is called "gerrymandering."

Like "reapportionment," the term "gerrymandering" has become so popular that it has lost its original precision and is often used to describe any technique by which a political party attempts to give itself an unfair advantage.

Used in its narrow sense, to refer only to the practice of creating districts that look like monsters, there are basically just two techniques -- packing and fracturing. How do they work?

1. Packing

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts -- 70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are "wasted." They are not available to help elect representatives in other districts, so they cannot elect representatives in proportion to their numbers in the state as a whole.

2. Fracturing

"Fracturing" is drawing district lines so that the minority population is broken up. Members of the minority are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts.

C. The Facts of Life

1. Creating a Gerrymander

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and that the majority will always be tempted to draw the lines in such a way as to enhance their prospects for victory at the next election.

If the supporters of the minority party were distributed evenly throughout the state, there would be no need to gerrymander. In a state where the minority party had 49 percent of the vote, they would lose every seat.

But I suspect that political minorities are not evenly distributed in any state, so the persons drawing the redistricting plan try to determine where they are, and draw their districts accordingly: first packing as many of them into as few districts as possible and then, where they

can't be packed, fracturing them into as many districts as possible. It is this process of drawing the district lines to first pack and then fracture the minority that creates the dragon-like districts called gerrymanders.

2. The Need for Limits

The more freedom the majority has to determine where the district boundary lines will go, the greater the temptation to gerrymander. Equal-population requirements, disfavor of multimember districts, and minority representation requirements are all attempts by the courts to restrain the majority from taking unfair advantage of their majority position when drawing redistricting plans.

II. Draw Districts of Equal Population

A. Use Official Census Bureau Population Counts

1. Alternative Population Counts

The first requirement for any redistricting plan to stand up in court is to provide districts of substantially equal population. But how do you know the population? The obvious way is to use official Census Bureau population counts from the 2000 census.

It is true that some legislatures have chosen to use data other than the Census Bureau's population counts to draw their districts and have had their plans upheld by federal courts. For example, back in 1966, Hawaii used the number of registered voters, rather than the census of population, to draw its legislative districts, and had its plan upheld by the U.S. Supreme Court in the case of Burns v. Richardson, 384 U.S. 73. But there the Court found that the results based on registered voters were not substantially different from the results based on the total population count.

A state may conduct its own census on which to base its redistricting plans. For example, a 1979 Kansas legislative

redistricting plan based on the state's 1978 agricultural census was upheld by a federal district court in the case of Bacon v. Carlin, 575 F. Supp. 763 (D. Kan. 1983), aff'd 466 U.S. 966 (1984). And in 1986, a Massachusetts legislative redistricting plan based on a state census was upheld by a federal district court in the case of McGovern v. Connolly, 637 F. Supp. 111 (D. Mass 1986).

Late in the decade, a federal court may find that local government estimates are a more accurate reflection of current population than old census counts and thus are an acceptable basis for developing redistricting plans before the next census. Garza v. County of Los Angeles, Findings of Fact and Conclusions of Law, No. CV 88-5143 KN (Ex) (C.D. Cal. June 4, 1990).

But generally, the federal courts will not simply accept an alternative basis used by the states. Rather, they will first check to see whether the districts are of substantially equal population based on Census Bureau figures. If they are not, the courts will strike them down.

So, if you want your plans to stand up in court, the easiest way is use official Census Bureau population counts.

2. Use of Sampling to Eliminate Undercount

For the year 2000 census, as there was for the 1990 census, there has been a political fight over how the population should be counted.

In the 1990s, the main political fight over how to count the population concerned how to compensate for the historic undercounting of racial and ethnic minorities. In response to a suit by the City of New York and other plaintiffs that sought to compel the Census Bureau to make a statistical adjustment to the population data to account for people the Bureau failed to count, the Bureau agreed to make a fresh determination of whether there should be a statistical

adjustment for an undercount or overcount in the 1990 census. The Bureau agreed to conduct a post enumeration survey of at least 150,000 households to use as the basis for the adjustment. The Bureau agreed that, by July 15, 1991, it would either publish adjusted population data or would publish its reasons for not making the adjustment. Any population data published before then, such as the state totals published December 31, 1990, and the block totals published April 1, 1991, would contain a warning that they were subject to correction by July 15. The Bureau ultimately decided not to make a statistical adjustment to correct for the undercount, and the Supreme Court found that its decision was reasonable and within the discretion of the Secretary of Commerce, in whose Department the Census Bureau is located. Wisconsin v. City of New York, 517 U.S. 1 (1996).

For the 2000 census, the fight has been over whether to use scientific sampling techniques to conduct the census from the beginning, rather than adjusting the population counts after they have been issued. The Census Bureau proposed that, in order to obtain information on at least 90 percent of the households in each census tract, it would use statistical sampling techniques to estimate the characteristics of the households that did not respond to the first two mailings of a census questionnaire. In each census tract, the fewer households that responded initially, the larger would be the size of the sample enumerators would contact directly as part of their follow-up. The addresses that would be included in the sample would be scientifically chosen at random to insure they were statistically representative of all nonresponding housing units in that census tract.

Congress attempted to stop the use of sampling by enacting Pub. L. No. 105-119, § 209 (j), 111 Stat. 2480 (1997), which required that all data releases for the 2000 census show "the

number of persons enumerated without using statistical methods." It also authorized lawsuits to determine whether the Bureau's plan to use sampling for apportioning seats in Congress was constitutional.

In Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999), the Supreme Court ruled that the Census Act prohibits the use of sampling for purposes of apportioning representatives in Congress among the states. It did not rule on the constitutionality of using sampling to determine the distribution of population within each state for purposes of redistricting its apportionment of congressional seats or the seats in its state legislature.

Following the Supreme Court's decision, the Census Bureau announced its plan to use statistical sampling methods to conduct a postenumeration survey called the "Accuracy and Coverage Evaluation." As of May 1, 2000, the Bureau was planning to publish the census counts derived from sampling along with the head counts mandated by Pub. L. No. 105-119. In other words, each state would receive two sets of census counts for each area within the state and would have to make its own decision which count to use for each area.

3. Exclusion of Undocumented Aliens

Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states.

4. Inclusion of Overseas Military Personnel

In 1990, the Department of Defense conducted a survey of its overseas military and civilian employees and their dependents to determine their "address of record." These overseas military personnel were allocated to the states

according to their address of record for purposes of apportioning the House of Representatives, but were not included in the April 1, 1991, block counts given to the states for use in redistricting.

Allocating overseas military personnel to the states caused one congressional seat to be shifted from Massachusetts to Washington State. Massachusetts sued the Secretary of Commerce, but the Supreme Court upheld the allocation. Franklin v. Massachusetts, 505 U.S. 788 (1992).

B. Measuring Population Equality

How does a court measure the degree of population equality in a redistricting plan? Let me give you an example. Let's say we have a state with a population of one million, and that it is entitled to elect ten representatives in Congress. (That is not a realistic number, but it is easier to work with.) The "ideal" district population would be 100,000. Let's say the legislature draws a redistricting plan that has five districts with a population of 90,000 and five districts with a population of 110,000. The "deviations" of the districts would be 10,000 minus and 10,000 plus, or minus ten percent and plus ten percent. The "average deviation" from the ideal would be 10,000 or ten percent. And the "overall range" would be 20,000, or 20 percent. Most courts have used what statisticians call the "overall range" to measure the population equality of a redistricting plan, though they have usually referred to it by other names, such as "maximum deviation," "total deviation," or "overall deviation."

C. Congressional Plans

1. "As Nearly Equal in Population As Practicable"

Once you know the population, and you know how to measure the degree of population equality in a plan, how equal do the districts have to be? First, you must

understand that the federal courts use two different standards for judging redistricting plans -- one for congressional plans and a different one for legislative plans.

The standard for congressional plans is based on Article I, Section 2, of the U.S. Constitution, which says:

Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . .

The standard for congressional plans is strict equality. In the 1964 case of Wesberry v. Sanders, 376 U.S. 1, the U.S. Supreme Court articulated that standard as "as nearly equal in population as practicable."

Notice the choice of words. The Court did not say "as nearly equal as practical." The American Heritage Dictionary defines "practicable" as "capable of being . . . done . . . ." It notes that something "practical" is not only capable of being done, but "also sensible and worthwhile." It illustrates the difference between the two by pointing out that "It might be practicable to transport children to school by balloon, but it would not be practical."

In 1983, in Karcher v. Daggett, 462 U.S. 725, the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than one percent. To be precise, .6984 percent, or 3,674 people. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population.

In the 1980s, three-judge federal courts drawing their own redistricting plans achieved near mathematical equality. For example, in Minnesota the court-drawn plan had an

overall range of 46 people (.0145 percent), LaComb v. Growe, 541 F. Supp. 145 (D. Minn. 1982) aff'd mem. sub nom. Orwoll v. LaComb, 456 U.S. 966 (1982) (Appendix A, unpublished) (In its opinion, the Court tells only the sum of all the deviations, 76 people, and refers to it as the "total population deviation"), and in Colorado the court-drawn plan had an overall range of ten people (.0020 percent), Carstens v. Lamm, 543 F. Supp. 68, 99 (D. Colo. 1982).

With the improvements in the census and in the computer technology used to draw redistricting plans after the 1990 census, the degree of population equality that was "practicable" was even greater than that achieved in the 1980s. Many states drew congressional plans with an overall range of either zero or one person. That is likely to be the standard for most plans in the future.

If you can't draw congressional districts that are mathematically equal in population, don't assume that others can't. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

2. Unless Necessary to Achieve "Some Legitimate State Objective"

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve "some legitimate state objective." Karcher v. Daggett, 462 U.S. 725, 740 (1983). As Justice Brennan, writing for the 5-4 majority in Karcher v. Daggett, said:

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding

contests between incumbent Representatives . . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

So, if you intend to rely on these "legitimate state objectives" to justify any degree of population inequality in a congressional plan, you would be well advised to articulate those objectives in advance, follow them consistently, and be prepared to show that you could not have achieved those objectives in each district with districts that had a smaller deviation from the ideal. Arkansas, Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991); Maryland, Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws, 781 F. Supp. 394 (D. Md. 1991); and West Virginia, Stone v. Hechler, 782 F. Supp. 1116 (W.D. W.Va. 1992); all were able to meet that burden when congressional plans drawn by the legislature were challenged in court in the 1990s.

Near the end of the decade, the Supreme Court upheld a court-drawn congressional plan in Georgia with an overall range of 0.35 percent (about 2,000 people). Abrams v. Johnson, 117 S. Ct. 1925 (1997). But that was the lowest range of all the plans that met constitutional requirements, Georgia was able to show it had a consistent historical practice of not splitting counties outside the Atlanta area, and likely shifts in population since 1990 had made any further effort to achieve population equality illusory.

D. Legislative Plans

1. An Overall Range of Less than Ten Percent

Fortunately for those of you who will be drawing redistricting plans after the 2000 census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, Section 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the 14th Amendment.

As Chief Justice Earl Warren observed in the 1964 case of Reynolds v. Sims, 377 U.S. 533, "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts." Id. at 579.

"Substantial equality of population" has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than ten percent.

The ten-percent standard was first articulated in a dissenting opinion written by Justice Brennan in the cases of Gaffney v. Cummings, 412 U.S. 735, and White v. Regester, 412 U.S. 755, in 1973. In later cases, the Court majority has endorsed and followed the rule Justice Brennan's dissent accused them of establishing. See, e.g., Chapman v. Meier, 420 U.S. 1 (1975); Connor v. Finch, 431 U.S. 407 (1977); Brown v. Thomson, 462 U.S. 835, 842-43 (1983); Voinovich v. Quilter, 507 U.S. 146 (1993).

2. Unless Necessary to Achieve Some "Rational State Policy"

The Supreme Court in Reynolds v. Sims had anticipated that some deviations from population equality in legislative plans might be justified if they were "based on legitimate considerations incident to the effectuation of a rational state policy . . . ." 377 U.S. 533, 579 (1964). So far, the only

"rational state policy" that has served to justify an overall range of more than ten percent in a legislative plan has been respecting the boundaries of political subdivisions. And that has happened in only three cases: Mahan v. Howell, 410 U.S. 315 (1973); Brown v. Thomson, 462 U.S. 835 (1983); and Voinovich v. Quilter, 507 U.S. 146 (1993).

In Mahan v. Howell, the Supreme Court upheld a legislative redistricting plan enacted by the Virginia General Assembly that had an overall range among House districts of about 16 percent. The Court took note of the General Assembly's constitutional authority to enact legislation dealing with particular political subdivisions, and found that this legislative function was a significant and a substantial aspect of the Assembly's powers and practices, and thus justified an attempt to preserve political subdivision boundaries in drawing House districts.

Brown v. Thomson, 462 U.S. 835 (1983), upholding a legislative plan with an overall range of 89 percent, was decided by the Supreme Court on the same day that it decided Karcher v. Daggett, 462 U.S. 725 (1983), where it threw out a congressional plan with an overall range of less than one percent. Reconciling these two cases is not easy. Nevertheless, I shall try.

First, as I have noted, the constitutional standard for legislative plans is different from the standard for congressional plans.

Second, it is important to understand that in Brown v. Thomson the Court was faced with a reapportionment plan rather than with a redistricting plan. The members of the Wyoming House of Representatives were being reapportioned among Wyoming's counties, rather than having new districts created for them. Because the

boundaries of the districts were not being changed, the opportunities for partisan mischief were far reduced.

Third, Wyoming put forward a "rational state policy" to justify an overall range of more than ten percent, and the Court endorsed it. Writing for the Court, Justice Powell concluded that Wyoming's constitutional policy--followed since statehood--of using counties as representative districts and insuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas. 462 U.S. at 843-46.

But Wyoming's policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving the smallest county a representative. Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was so narrowly drawn that she had voted to reject it. 462 U.S. at 850. The Court reaffirmed this narrow view of its holding in Brown by later citing it as authority for the statement that "no case of ours has indicated that a deviation of some 78% could ever be justified." Board of Estimate v. Morris, 489 U.S. 688, 702 (1989).

In Voinovich v. Quilter, 507 U.S. 146 (1993), the Supreme Court reversed a decision of the federal district court striking down Ohio's legislative plan because the overall

range of the House plan was 13.81 percent and the overall range of the Senate plan was 10.54 percent. The Court pointed out that preserving the boundaries of political subdivisions was a "rational state policy" that might justify an overall range in excess of ten percent.

There may not be any other "rational state policies" that will justify a legislature in exceeding the ten-percent standard. But with the multitude of plans that are likely to be submitted to you for your consideration, you may wish to adopt other policies to govern plans that are within the ten-percent overall range.

Three-judge courts, who are called upon to draw redistricting plans when legislatures do not, often have adopted criteria for the parties to follow in submitting proposed plans to the court. These criteria are not required by the federal constitution, and have not been used to justify exceeding the ten-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These criteria often have included:

- districts must be composed of contiguous territory; Carstens v. Lamm, 543 F. Supp. 68, 87-88 (D. Colo. 1982); Shayer v. Kirkpatrick, 541 F. Supp. 922, 931 (W.D. Mo. 1982) aff'd sub nom. Schatzle v. Kirkpatrick, 456 U.S. 966 (1982); LaComb v. Growe, 541 F. Supp. 145, 148 (D. Minn. 1982);

- districts must be compact; e.g., Carstens v. Lamm, 543 F. Supp. at 87-88; Shayer v. Kirkpatrick, 541 F. Supp. at 931; LaComb v. Growe, supra; South Carolina State Conference of Branches of the National Association for the Advancement of Colored People v. Riley, 533 F. Supp. 1178, 1181 (D. S.C. 1982); Dunnell v. Austin, 344 F. Supp. 210 (E.D.

Mich. 1972); David v. Cahill, 342 F. Supp. 463 (D. N.J. 1972); Preisler v. Secretary of State, 341 F. Supp. 1158 (W.D. Mo. 1972); Skolnick v. State Electoral Board, 336 F. Supp. 839, 843 (N.D. Ill. 1971); Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 253 F. Supp. 731, 734 (D. Md. 1966) aff'd mem. sub nom. Alton v. Tawes, 384 U.S. 315 (1966); and

- districts should attempt to preserve communities of interest; e.g., Carstens v. Lamm, 543 F. Supp. at 91-93; Shayer v. Kirkpatrick, 541 F. Supp. at 934; LaComb v. Growe, supra; Riley, 533 F. Supp. at 1181; Dunnell v. Austin, 344 F. Supp. at 216; Tawes, 253 F. Supp. at 735; Skolnick, 336 F. Supp. at 845-46.

As of 1983, the constitutions of 27 states required districts to be composed of contiguous territory, and the constitutions of 21 states required that districts be compact. Karcher v. Daggett, 462 U.S. 725, 756 n. 18 (1983) (Stevens, J., concurring).

The Supreme Court has begun to refer to these criteria (including respecting the boundaries of political subdivisions) as "traditional districting principles." See, e.g., Shaw v. Reno, 509 U.S. 630, 647 (1993) (slip op. at 6-17); Miller v. Johnson, 515 U.S. 900, 919 (slip op. at 16) (1995); Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894, 1901 (1996); Bush v. Vera, 517 U.S. 952, ____, 116 S. Ct. 1941, 1952 (1996); Abrams v. Johnson, 117 S. Ct. 1925, 1932-38 (1997).

III. Don't Discriminate Against Racial or Language Minorities

A. Section 2 of the Voting Rights Act

1. No Discriminatory Effect

Assuming that you are prepared to meet equal population requirements, you will also want to make sure you do not discriminate against minorities.

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973[1], attempts to secure this political power for racial and language minorities by prohibiting states and political subdivisions from imposing or applying voting qualifications; prerequisites to voting; or standards, practices, or procedures to deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group.

Section 2 has been used to attack reapportionment and redistricting plans on the ground that they discriminated against Blacks or Hispanics and abridged their right to vote by diluting the voting strength of their population in the state.

Until the U.S. Supreme Court case of City of Mobile v. Bolden, 446 U.S. 55, in 1980, the courts generally considered whether a particular redistricting plan had the effect of diluting the voting strength of the Black population. In Bolden, Black residents of Mobile, Alabama, charged that the city's practice of electing commissioners at large diluted minority voting strength. The Supreme Court, however, refused to throw out the at-large plan. The Court interpreted Section 2 as applying only to actions intended to discriminate against Blacks, and since the plaintiffs had failed to prove that it was adopted with an intent to discriminate against Blacks, the Court concluded that the plan did not violate Section 2.

Congress quickly rejected the Court's interpretation by amending Section 2. As enacted, it had prohibited conduct "to deny or abridge" the rights of racial and language

minorities. 42 U.S.C.A. § 1973 (1981). The 1982 amendments changed that to prohibit conduct "which results in a denial or abridgement" of those rights. Pub.L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134, codified as amended at 42 U.S.C. § 1973. Congress also decided to codify the pre-Bolden case law by adding:

A violation of [section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

2. The Three Gingles Preconditions

The 1982 amendments to Section 2 were first considered by the Supreme Court in the 1986 case of Thornburg v. Gingles, 478 U.S. 30, which challenged legislative redistricting plans in North Carolina. At issue were one multimember Senate district, one single-member Senate district, and five multimember House districts. Justice Brennan's majority opinion upheld the constitutionality of Section 2, as amended. In order to assist courts in evaluating challenges to redistricting plans, Justice Brennan imposed three preconditions that a plaintiff must prove before a court must proceed to a detailed analysis of a plan:

1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.

478 U.S. at 50-51.

The Court has since held that the three preconditions also apply to Section 2 challenges to single-member districts. Growe v. Emison, 507 U.S. 25, 40-41 (1993).

3. "The Totality of the Circumstances"

Once these three preconditions are satisfied, Justice Brennan said that a court must consider several additional "objective factors" in determining the "totality of the circumstances" surrounding an alleged violation of Section 2. They include the following:

1) the extent of the history of official discrimination touching on the class participation in the democratic process;

2) racially polarized voting;

3) the extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, antisingle-shot provisions, or other voting practices that enhance the opportunity for discrimination;

4) denial of access to the candidate slating process for members of the class;

5) the extent to which the members of the minority group bear the effects of discrimination in areas like education,

employment, and health, which hinder effective participation;

6) whether political campaigns have been characterized by racial appeals;

7) the extent to which members of the protected class have been elected;

8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the group; and

9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

478 U.S. at 36-37.

In Gingles, the Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected.

4. Draw Districts the Minority Has a Fair Chance to Win

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented members of the minority from being elected in the past, you may have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. How much of a majority is that?

Under Section 2, that depends on "the totality of the circumstances." In other words, there is no fixed rule that applies to all cases.

The Supreme Court, in the case of United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 164 (1977), upheld a determination by the Justice Department that a 65 percent non-White population

majority was required to achieve a non-White majority of eligible voters in certain legislative districts in New York City.

The Court of Appeals for the Seventh Circuit, in the case of Ketchum v. Byrne, 740 F.2d 1398 (1984), endorsed the use of a 65 percent Black population majority to achieve an effective voting majority in the absence of empirical evidence that some other figure was more appropriate.

Ketchum involved the redistricting of city council wards in the city of Chicago after the 1980 census. The Court of Appeals found that "minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote," and that therefore, voting age population was a more appropriate measure of their voting strength than was total population. Further, because the voting age population of Blacks usually has lower rates of voter registration and voter turnout, the district court should have considered the use of a supermajority, such as 65 percent of total population or 60 percent of voting age population when attempting to draw districts the Blacks could win. The Court of Appeals noted that:

[J]udicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.

. . . This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out . . . .

Id. at 1415.

But the Court of Appeals in Ketchum also noted that "The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data," id. at 1416. In redistricting following the 1990 census, several courts found that, in view of rising rates of voter registration and voter participation among minority groups, a minority voting age population of slightly more than 50 percent was sufficient to provide an effective voting majority.

The Seventh Circuit in Ketchum warned that "provision of majorities exceeding 65%-70% may result in packing." Id. at 1418. But the Court of Appeals for the First Circuit upheld a redistricting plan for the city of Boston where, of two districts where Blacks were a majority, one district had a Black population of 82.1 percent. Latino Political Action Committee v. City of Boston, 784 F.2d 409 (1st Cir. 1986). The Court found that this packing of Black voters did not discriminate against Blacks because there was only a moderate degree of racial polarization. As the Court said, "[T]he less cohesive the bloc, the more "packing" needed to assure . . . a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance.)" Id. at 414. The Black population was so distributed that, even if fewer Blacks were put into these two districts, there were not enough Blacks to create a third district with an effective Black majority. Id.

If you face a charge of a Section 2 violation, you had better be prepared with empirical data show what is "reasonable and fair" under "the totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

B. Section 5 of the Voting Rights Act

1. In "Covered Jurisdictions," Plans Must be Precleared

While Section 2 of the Voting Rights Act applies throughout the United States, Section 5, codified as amended at 42 U.S.C. § 1973c, applies only to certain covered jurisdictions, which are listed in table 6 of NCSL's new book Redistricting Law 2000 . If you're covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be cleared, before they take effect, by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.

2. Do Not Regress

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan fails to meet the no "retrogression" test, first set forth in Beer v. United States, 425 U.S. 130 (1976), and reaffirmed in City of Lockhart v. United States., 460 U.S. 125 (1985). Simply stated, the test means that a plan will not be precleared if it makes the members of a racial or language minority worse off than they were before. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.

Beer was a challenge to the 1971 redistricting of the city council seats for the city of New Orleans. Since 1954, two of the seven council members had been elected at large; five others had been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered

voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks' electoral power.

To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a ten-year history of the success of the minority at electing representatives.

In 1987, the Justice Department announced that, notwithstanding the retrogression test employed by the courts when considering preclearance under Section 5, the Justice Department would apply the stricter standards of Section 2 when deciding whether to preclear a plan under Section 5. Supplemental Information, 52 Fed. Reg. 487 (1987). This practice has now been discredited by the Supreme Court. See Reno v. Bossier Parish School Bd., 117 S. Ct. 1491 (1997).

The Bossier Parish (Louisiana) School Board had redrawn its 12 single-member districts following the 1990 census, using the same plan already precleared for use by its governing body. In doing so, it rejected a plan proposed by the NAACP that would have created two majority-Black districts. The Justice Department refused to grant preclearance on the ground that the NAACP plan demonstrated that Black residents could have been given more opportunity to elect candidates of their choice and that therefore their voting strength was diluted in violation of Section 2. The Supreme Court rejected this argument, saying that preclearance under Section 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates Section 2. The Court pointed out that sections 2 and 5 were designed to

combat two different evils, and that Section 5 was only directed at effects that are retrogressive.

Even though your plan doesn't make racial or language minorities any worse off than they were before, and therefore gets precleared by the Justice Department, don't think that you are immune from a challenge under Section 2. The Justice Department made it clear in 1987 that "Section 5 preclearance will not immunize any change from later challenge by the United States under amended Section 2." Supplemental Information, 52 Fed. Reg. 487 (1987). After Bossier Parish, a subsequent attack by the Justice Department against a precleared plan seems even more likely.

3. You Need Not Maximize the Number of Minority Districts

Notwithstanding anything you might have been told by the Justice Department in the 1990s, you are not required to maximize the number of majority-minority districts.

In the 1990s round of redistricting, the natural desire of some minority populations to be grouped together in districts they could win coincided with the desire of some plan drafters to pack them. Since African Americans and Hispanics have tended to vote Democratic, Republican plan drafters were more than willing to accommodate their desire to have districts drawn for them. When new redistricting plans were drawn in preparation for the 1991 and 1992 elections, the Justice Department was controlled by Republicans. As states like North Carolina, Georgia, Louisiana, and Texas presented their plans to the Justice Department for approval, the Justice Department insisted that they create additional majority-minority districts wherever the minority populations could be found to create them. This insistence was not limited by any concern that

the districts be "geographically compact." The States' plans were first denied preclearance and then, after majority-minority districts were added, the plans were precleared. These plans have now all been struck down by the courts. Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd sub nom. Miller v. Johnson, 515 U.S. 900 (1995); Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996); Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996).

The Justice Department's policy of pressuring states to maximize the number of majority-minority districts was not based on a correct reading of the Voting Rights Act.

Section 2 included a proviso, added through the efforts of Senator Dole in 1982, that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). In other words, Section 2 did not mandate proportional representation. So, how could it be construed by the Justice Department to require that a minority group be given the maximum number of elected representatives?

In Johnson v. DeGrandy, 512 U.S. 997 (1994), the Supreme Court found that it could not be so construed. The Florida Legislature had drawn a House plan that created nine districts in Dade County (Miami) where Hispanics had an effective voting majority. Miguel DeGrandy and the Justice Department attacked the plan in federal court, alleging that the Hispanic population in Dade County was sufficient to create 11 House districts where Hispanics would have an effective voting majority. The district court agreed, imposing its own plan (based on one submitted by DeGrandy) that created 11 Hispanic districts. The Supreme Court reversed, saying that maximizing the number of

majority-minority districts was not required. As Justice Souter said in his opinion for the Court, "Failure to maximize cannot be the measure of § 2." 512 U.S. 1017 (slip op. at 20). Indeed, even a failure to achieve proportionality does not, by itself, constitute a violation of Section 2. 512 U.S. at 1009-12 (slip op. at 11-14).

The Court refused to draw a bright line giving plan drafters a safe harbor if they created minority districts in proportion to the minority population. That, the Court said, would ignore the clear command of the statute that the question of whether minority voters have been given an equal opportunity to elect representatives of their choice must be decided based on "the totality of the circumstances," rather than on any single test. It would encourage drafters to draw majority-minority districts to achieve proportionality even when they were not otherwise necessary and would foreclose consideration of possible fragmentation of minority populations among other districts where they were not given a majority. 512 U.S. at 1017-21 (slip op. at 20-24).

In the Georgia congressional redistricting case, Miller v. Johnson, 515 U.S. 900 (1995), the Supreme Court scolded the Justice Department for having pursued its policy of maximizing the number of majority-minority districts. As the Court said:

Although the Government now disavows having had that policy . . . and seems to concede its impropriety . . . the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans . . . . In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

515 U.S. at 924-25.

C. Equal Protection Clause of the 14th Amendment

When drawing a minority district to avoid a violation of Section 2 or Section 5 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the Equal Protection Clause of the 14th Amendment.

1. You May Consider Race in Drawing Districts

Race-based redistricting is not always unconstitutional. As the Supreme Court recognized in Shaw v. Reno, 509 U.S. 630 (1993):

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature is always aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646 (slip op. at 14).

You may even intentionally create majority-minority districts, as a California state court did, see DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd 515 U.S. 1170 (1995), without violating the Equal Protection clause. Bush v. Vera, 517 U.S. 952, ____, 116 S. Ct. at 1951 (1996).

2. Avoid Drawing a Racial Gerrymander

But, when a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably thrown out. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996). If you want your majority-minority districts to stand up in court, you would best avoid drawing a racial gerrymander.

a. Beware of Bizarre Shapes

The first step toward avoiding drawing a racial gerrymander is to beware of bizarre shapes.

The 12th Congressional District in North Carolina, as put into place for the 1992 election, was one of the most egregious racial gerrymanders ever drawn. The "I-85" district, stretching 160 miles across the State, for much of its length no wider than the freeway, but reaching out to pick up pockets of African Americans all along the way. It was first attacked as a partisan gerrymander. That attack failed.

Pope v. Blue, 809 F. Supp. 392 (W.D. N.C. 1992), aff'd mem. 506 U.S. 801 (1992).

Next, it was attacked as a racial gerrymander. That attack failed in the district court, Shaw v. Barr, 809 F. Supp. 392 (W.D. N.C. 1992), but the legal theory on which it was based was endorsed by the Supreme Court in Shaw v. Reno, 509 U.S. 630 (1993).

As Justice O'Connor said, "[R]eapportionment is one area in which appearances do matter." 509 U.S. at 647 (slip op. at 15).

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls . . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647-48 (slip op. at 15-16).

The Court said that a redistricting plan that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny under the Equal Protection Clause given to other state laws that classify citizens by race. 509 U.S. at 644 (slip op. at 12).

In Bush v. Vera, Justice O'Connor further observed that:

[B]izarre shape and noncompactness cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [C]utting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of identity and thus intensifies the emphasis on race.

517 U.S. 952, ____,116 S. Ct. at 1962 (1996).

b. Draw Districts that are Reasonably Compact

To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? Reasonably compact. As Justice O'Connor said in Bush v. Vera, 517 U.S. 952 (1996):

A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

517 U.S. at ____, 116 S. Ct. at 1960.

To give you some idea of what the lower federal courts have considered to be "reasonably compact," there follows a series of "before and after" pictures of congressional districts first used in the 1992 election and then struck down, and the districts approved by the federal courts to replace them. They come from the states of Texas, Louisiana, Florida, and North Carolina.

A 190

Texas

Congressional District 30

1992

1996

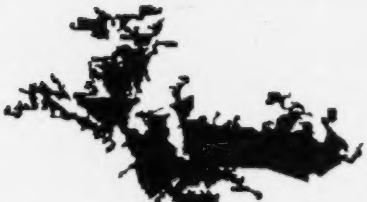
Congressional District 18

1992

1996

Congressional District 29

1992

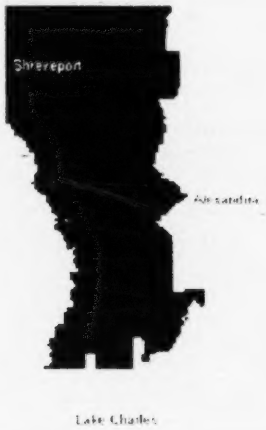


1996

A 191
Louisiana
Congressional District 4

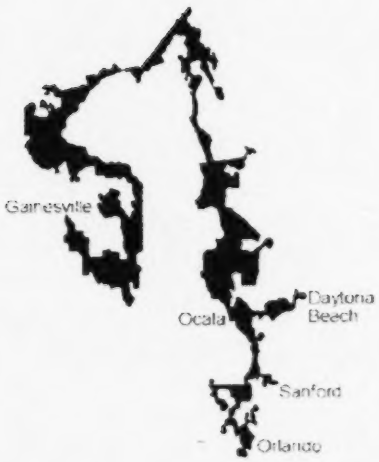
1992

1996



Florida
Congressional District 3

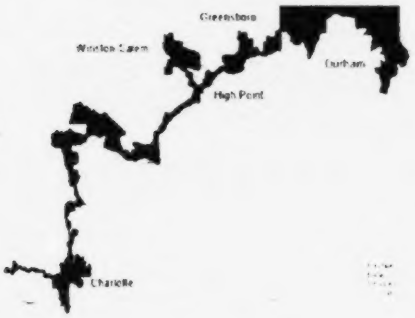
1992



1996

North Carolina
Congressional District 12

1992



1998

2000

c. Beware of Making Race Your Dominant Motive

Even if the shapes of your districts are not bizarre, and even if they are reasonably compact, you may nevertheless run afoul of the Equal Protection Clause if race was your dominant motive for drawing the lines the way you did.

Georgia's 11th Congressional District, as enacted in 1992, stretched from Atlanta to the sea, but not in the 60-mile-wide swath cleared by General Sherman. Rather, it began with a small pocket of Blacks in Atlanta, spread out to pick up the sparsely populated rural areas, and narrowed considerably to pick up more pockets of Blacks in Augusta and Savannah, 260 miles away. Miller v. Johnson, 515 U.S. 900, 908-09 (1995). It had not been included in either of the first two plans enacted by the Legislature in 1991 and sent to the Department of Justice for preclearance. Both of those plans had included two Black-majority districts. The Justice Department had rejected them for failure to create a third. This rejection had occurred notwithstanding that the 1980 plan had included only one Black-majority district and that there was no evidence the Georgia Legislature had intended to discriminate against Blacks in drawing the 1991 plans. The new district in the 1992 plan was drawn to meet the Department's requirement that the State maximize the

number of Black-majority districts, and it's inclusion in the third plan was sufficient to obtain preclearance from the Justice Department. 515 U.S. at 906-09.

In Miller v. Johnson, 515 U.S. 900 (1995), the Supreme Court shifted its focus away from the shape of the district, saying that plaintiffs challenging a racial gerrymander need not prove that a district has a bizarre shape. The shape of the district is relevant, not because bizarreness is a necessary element of the constitutional wrong, but because it may be persuasive circumstantial evidence that race was the Legislature's dominant motive in drawing district lines. Where district lines are not so bizarre, plaintiffs may rely on other evidence to establish race-based redistricting. 515 U.S. at 912-13.

In Georgia's case, the Legislature's correspondence with the Justice Department throughout the preclearance process demonstrated that race was the dominant factor the Legislature considered when drawing the 11th District. The Court found that the Legislature had considered "traditional race-neutral districting principles," such as compactness, contiguity, and respect for political subdivisions and communities of interest, but that those principles had been subordinated to race in order to give the 11th District a Black majority. 515 U.S. at 919-20. The Court subjected the district to strict scrutiny and struck it down. 515 U.S. at 920-27.

d. Beware of Using Race as a Proxy for Political Affiliation

If you want to argue that partisan politics, not race, was your dominant motive in drawing district lines, beware of using racial data as a proxy for political affiliation. The Texas Legislature tried that in the 1990s, and three of its congressional districts were struck down.

Congressional District 30

Congressional District 18

Congressional District 29

Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic-majority district in South Texas, one new African American majority district in Dallas County (District 30), and one new Hispanic-majority district in the Houston area (District 29). In addition, the Legislature decided to reconfigure a district in the Houston area (District 18) to increase its percentage of African Americans. The Texas Legislature had developed a state-of-the-art computer system that allowed it to draw congressional districts using racial data at the census block level. Working closely with the Texas congressional delegation and various members of the Legislature who intended to run for Congress, the Texas Legislature took great care to draw three new districts and reconfigure a district that the chosen candidates could win.

Plaintiffs challenged 24 of the State's 30 congressional districts as racial gerrymanders. The federal district court struck down three, Districts 18, 29, and 30, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994). On appeal, the State argued that the bizarre shape of District 30 in Dallas County was explained by the drafters' desire to unite urban communities of interest and that the bizarre shape of all

three districts was attributable to the Legislature's efforts to protect incumbents of old districts while designing the new ones. The Supreme Court upheld the district court's finding to the contrary, holding that race was the predominant factor. The Legislature's redistricting system had election data and other political information at the precinct level, but it had race data down to the block level. The district lines closely tracked the racial block data. The Court found that, to the extent there was political manipulation, race was used as a proxy for political affiliation. It was race that predominated. Bush v. Vera, 517 U.S. 952, ___, 116 S. Ct. 1941, 1959-61 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at ____, 116 S. Ct. at 1961-62.

e. Follow Traditional Districting Principles

As the preceding discussion shows, one way to avoid drawing a racial gerrymander that runs afoul of the Equal Protection Clause is to follow traditional districting principles. What are "traditional districting principles" and where do they come from?

The Supreme Court first used the term "traditional districting principles" in the 1993 North Carolina case, mentioning "compactness, contiguity, and respect for political subdivisions" as examples. Shaw v. Reno, 509 U.S. 630 at 647 (slip op. at 15). Later, in the 1995 Georgia case, it added "respect for . . . communities defined by actual shared interests." Miller v. Johnson, 515 U.S. 900, 919-20 (1995). In the Texas case, it added "maintaining . . . traditional boundaries." Bush v. Vera, 517 U.S. 952, ____ , 116 S. Ct. at 1960 (1996). And in the 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." Abrams v. Johnson, 117 S. Ct. 1925, ____ (slip op. at 8-9).

These "traditional districting principles" are not found in the U.S. Constitution, but rather in the constitutions, laws, and resolutions of the several states. The districting principles used by each state in the 1990s are shown in table 5 and appendix G of NCSL's book, Redistricting Law 2000. The Supreme Court has now mentioned all of the most common districting principles used by the states, but there are a number of others used only by a few states.

Before drawing any plan for your state, you will want to become familiar with the requirements of your own constitution and consider whether to adopt additional districting principles to govern your plans.

3. Strict Scrutiny is Almost Always Fatal

If you do choose to subordinate traditional districting principles to race in order to create a majority-minority district, be aware that it is unlikely your district will stand up in court. A racial gerrymander is subject to strict scrutiny under the Equal Protection Clause of the 14th Amendment. Shaw v. Reno, 509 U.S. 630 (1993). To survive strict scrutiny, a racial classification must be narrowly tailored to serve a compelling governmental interest. Id.

a. A Compelling Governmental Interest

What may qualify as a "compelling governmental interest"? So far, the Supreme Court has considered remedying past discrimination, avoiding retrogression in violation of Section 5 of the Voting Rights Act, and avoiding a violation of Section 2 of the Voting Rights Act to be possible compelling governmental interests.

b. Narrowly Tailored to Achieve that Interest

During the 1990s, however, no racial gerrymander was explicitly found by the Supreme Court to have been sufficiently narrowly tailored to achieve any of these

compelling governmental interests. See, e.g., Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996); contra, King v. State Board of Elections, 979 F. Supp. 582 (N.D. Ill. 1996), vacated mem. sub nom. King v. Illinois Board of Elections, 117 S. Ct. 429, on remand 979 F. Supp. 619 (N.D. Ill. 1997), aff'd mem. 118 S. Ct. 877 (1998). Don't assume that yours will be the first.

(1) Remedying Past Discrimination

Remedying past discrimination has traditionally been a justification for a governmental entity to adopt a racial classification. See, e.g., Richmond v. J.A. Crosun Co., 488 U.S. 469, 491-93 (1989); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280-82 (1986). In the context of redistricting, this justification has not yet proved sufficient. In Shaw v. Reno, the Supreme Court warned that the State must have "a strong basis in evidence for concluding that remedial action is necessary," 509 U.S. 630, 656(slip op. at 24), and that "race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State employs sound districting principles, and only when the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." 509 U.S. at 657 (slip op. at 25) (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12th congressional district was struck down. Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996).

In Bush v. Vera, 517 U.S. 952 (1996), the Court found that the district lines drawn by the Texas Legislature were not justified as an attempt to remedy the effects of past discrimination, since there was no evidence of present discrimination other than racially polarized voting.

(2) Avoiding Retrogression Under Section 5

The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of Section 5 of the Voting Rights Act would be a compelling governmental interest.

In Shaw v. Reno, 509 U.S. 630 (1993), the Court anticipated that the State might assert on remand that complying with Section 5 was a compelling governmental interest that justified the creation of District 12. But the Court warned that "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." 509 U.S. at 655 (slip op. at 23). In Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996), the Court noted that, before the 1990 census, North Carolina had had no Black-majority districts. The first plan drawn by the State after the 1990 census had included one Black-majority district, not District 12. The Court found that adding District 12 as a second Black-majority district was not necessary in order to avoid retrogression. 517 U.S. at ____, 116 S. Ct. at 1904. Since the 12th district was not narrowly tailored to serve the State's interest in complying with Section 5, or any other compelling state interest, the Court struck it down.

In Miller v. Johnson, 515 U.S. 900 (1995), the Court found that it was not necessary for the Georgia Legislature to draw a third Black-majority district in order to comply with Section 5. The plan for the 1980s had included one Black-majority district. The first two previous plans enacted by the Georgia Legislature after the 1990 census had included two Black-majority districts, thus improving on the status quo. Adding a third Black-majority district was not necessary and thus not narrowly tailored to achieve the State's interest in complying with Section 5. 515 U.S. at 920-27.

On remand, the federal district court first allowed the Georgia Legislature an opportunity to draw a new plan. When the Legislature failed to agree on a plan, the district court found that Georgia's Second Congressional District was also an unconstitutional racial gerrymander. Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga., Dec. 1, 1995). The district court reasoned that, since the enacted plan was the product of improper pressure imposed by the Justice Department, it did not embody the Legislature's own policy choices and therefore should not be used as the basis for the court's remedial plan. The district court then imposed an entirely new plan with only one Black-majority district, District 4. Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga., Dec. 13, 1995).

Georgia Congressional District 4 - 1996

The court's plan was used for the 1996 election, but the district court's decision was appealed to the Supreme Court on the ground that the court failed to give due deference to the Legislature's policy choices.

In Abrams v. Johnson, 117 S. Ct. 1925 (1997), the Supreme Court affirmed. It found that neither the Legislature's 1991

plan, rejected by the Justice Department because it contained only two Black-majority districts, nor the 1992 plan, with three Black-majority districts, embodied the Legislature's own policy choices because of the improper pressure imposed by the Justice Department. It found the district court was within its discretion in deciding it could not draw two Black-majority districts without engaging in racial gerrymandering. Since the last valid plan, the 1982 plan, contained only one Black-majority district, the district court's one-district plan did not retrogress in violation of Section 5 of the Voting Rights Act.

(3) Avoiding a Violation of Section 2

In Shaw v. Reno, 509 U.S. 630 (1993), the Supreme Court noted that the State of North Carolina had asserted that a race-based district was necessary to comply with Section 2 of the Voting Rights Act. The Court left the arguments on that question open for consideration on remand. 509 U.S. at 655-56 (slip op. at 23-24).

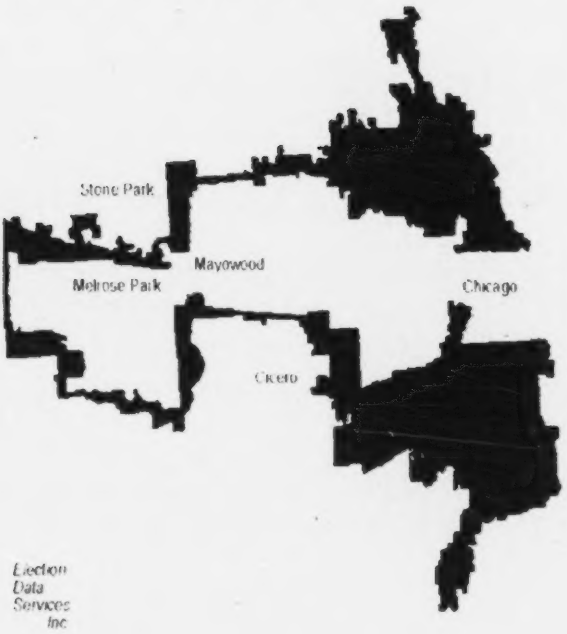
When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both Section 2 and Section 5, Shaw v. Hunt, 861 F. Supp. 408 (E.D. N.C. 1994), the Supreme Court again reversed the district court.

The Court said that, to make out a violation of section 2, a plaintiff must show that a minority population is "sufficiently large and geographically compact to constitute a majority in a single member district." The Court noted that District 12 had been called "the least geographically compact district in the Nation." Shaw v. Hunt, 517 U.S. 899, ____, 116 S. Ct. 1894, 1901 (1996). There may have been a place in North Carolina where a geographically compact minority population existed, but the shape of District 12 showed that District 12 was not that place. Since District 12

did not encompass any "geographically compact" minority population, there was no legal wrong for which it could be said to provide the remedy. 517 U.S. at ____, 116 S. Ct. 1906.

In the Texas case, Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1894 (1996), the Court again assumed without deciding that complying with Section 2 was a compelling state interest, 517 U.S. at ____, 116 S. Ct. at 1960, but found that the districts were not narrowly tailored to comply with Section 2 because all three districts were bizarrely shaped and far from compact as a result of racial manipulation. The court pointed out that, if the minority population is not sufficiently compact to draw a compact district, there is no violation of Section 2; if the minority population is sufficiently compact to draw a compact district, nothing in Section 2 requires the creation of a race-based district that is far from compact. 517 U.S. at ____, 116 S. Ct. at 1961.

During the 1990s, one racial gerrymander did survive strict scrutiny: the Fourth Congressional District of Illinois, the "ear muff" district in Chicago. It was found necessary in order to achieve the compelling state interest of remedying a potential violation of or achieving compliance with Section 2 of the Voting Rights Act.



Following the Supreme Court's decision in Shaw v. Reno, 509 U.S. 630 (1993), plaintiffs in Illinois attacked District 4. The district had been drawn by a federal district court to create an Hispanic-voting-majority district without diminishing the African American voting strength in three adjacent districts with African American majorities. When forced to review the prior decision in the light of Shaw v. Reno and Miller v. Johnson, a different panel of the district court found that the compactness requirement of Thornburg v. Gingles applied only in determining whether a Section 2 violation had occurred, not in drawing a district to remedy the violation. It found that the ear muff shape was necessary in order to provide Hispanics with the representation that their population warranted without causing retrogression in African American representation. It held that the Fourth District survived strict scrutiny. King v. State Board of Elections, 979 F. Supp. 582 (N.D. Ill. 1996).

Plaintiffs appealed. The Supreme Court vacated the judgment and remanded to the district court for further consideration in light of its decisions in the North Carolina and Texas cases. King v. Illinois Board of Elections, 117 S. Ct. 429 (1996) (mem.).

On remand, the district court found that the Fourth District had been narrowly tailored to achieve the compelling state interest of remedying a potential violation of or achieving compliance with Section 2 and, therefore, did not violate the Equal Protection Clause. King v. State Board of Elections, 979 F. Supp. 619 (N.D. Ill. 1997), aff'd mem. 118 S. Ct. 877 (1998).

IV. Don't Go Overboard with Partisan Gerrymandering

A. Partisan Gerrymandering is a Justiciable Issue

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in some states and Democrats in others. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

Modern technology, while making it practicable to draw districts that are mathematically equal, has also allowed the majority to draw districts that pack and fracture the partisan minority in such a way as to minimize the possibility of their ever becoming a majority.

While the federal courts have not yet developed criteria for judging whether a gerrymandered redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court has held, in Davis v. Bandemer, 478 U.S. 109 (1986), that partisan gerrymandering is a justiciable issue. What this means is that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground

that they unconstitutionally discriminate against the partisan minority.

Davis v. Bandemer involved a legislative redistricting plan adopted by the Indiana Legislature in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, the equal protection of the laws.

The plan had an overall range of 1.15 percent for the Senate districts and 1.05 percent for the House districts, well within equal-population requirements. The plan's treatment of racial and language minorities met the no-retrogression test of the Voting Rights Act.

The Senate was all single-member districts, but the House included nine double-member districts and seven triple-member districts, in addition to 61 that were single-member. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed, although township lines generally were. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts with large Democratic majorities, and fractured into districts where Republicans had a safe but not excessive majority. The Speaker of the House testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

At the 1982 election, held under the challenged plan, Democratic candidates for the Senate received 53.1 percent of the vote statewide and won 13 of the 25 seats up for election. (Twenty-five other Senate seats were not up for election.) Democratic candidates for the House received

51.9 percent of the vote statewide, but won only 43 of 100 seats. In two groups of multimember House districts, Democratic candidates received 46.6 percent of the vote, but won only 3 of 21 seats.

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan denied them fair representation. The Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that:

[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

. . . Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. (Emphasis added.)

. . . Such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

478 U.S. at 132-33.

Merely showing that the minority is likely to lose elections held under the plan is not enough. As the Court pointed out, "the power to influence the political process is not limited to winning elections. . . . We cannot presume . . . , without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her]." 478 U.S. at 132.

B. Can It Be Proved?

How do the members of a major political party prove that they do not have "a fair chance to influence the political process?"

When California Republicans attacked the partisan gerrymander enacted by the Democratic legislature to govern congressional redistricting, the Supreme Court summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans had failed to show that they had been denied a fair chance to influence the political process. Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), aff'd mem., 488 U.S. 1024 (1989). As the lower court said:

Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' [citation omitted] There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies. [citation omitted]

694 F. Supp. at 670.

Further, the Court took judicial notice that Republicans held 40 percent of the congressional seats and had a Republican governor and United States senator.

Given also the fact that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in 'the political process as a whole' because of the paralysis of an unfair gerrymander.

694 F. Supp. at 672.

During the 1990s, the Virginia state house plan and the North Carolina congressional plan were attacked as partisan political gerrymanders, but both attacks failed. Republican Party of Virginia v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991); Pope v. Blue, 809 F. Supp. 392 (W.D. N.C. 1992), aff'd mem. 506 U.S. 801 (1992).

In a democracy, the majority does not need to have the leaders of the opposition shot, or jailed, or banished from the country, or even silenced. They do not need to shut the minority out of the political process--they simply out vote them.

If the members of the majority party in your State are prepared to let the minority party participate fully in the process of drawing redistricting plans, and simply out vote them when necessary, your State should be prepared to withstand a challenge that the plans unconstitutionally discriminate against the partisan minority.

V. Prepare to Defend Your Plan in Both State and Federal Courts

After the 1990 census, 20 states had suits in state courts concerning redistricting plans; 28 states had suits in federal court. Eleven states had suits in both state and federal courts on the same plan. New York had cases in four different federal courts and three different state courts.

After the 2000 census, you had better be prepared to defend your plan in both state and federal courts at the same time. How should all this parallel litigation be coordinated?

A. Federal Court Must Defer to State Court

In a 1965 case, Scott v. Germano, 381 U.S. 407 (per curiam), the Supreme Court recognized that state courts have a significant role in redistricting and ordered the federal district court to defer action until the state authorities, including the state courts, had had an opportunity to redistrict. In the 1990s, some federal district courts properly deferred action pending the outcome of state proceedings. See, e.g., Members of the Cal. Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), rev'd, Benavidez v. Eu, 34 F.3d 825 (9th Cir. 1994) (deferral until conclusion of state proceedings was proper; dismissal "went too far"), but others did not. See, e.g., Puerto Rican Legal Defense and Education Fund v. Gantt, 796 F. Supp. 677 (E.D. N.Y. 1992), injunction stayed mem. sub nom. Gantt v. Skelos, 504 U.S. 902 (1992).

In Minnesota, after a state court had issued a preliminary order correcting the technical errors in the legislative plan enacted by the Legislature, the federal district court enjoined the state court from issuing its final plan. Emison v. Growe, Order, No. 4-91-202 (D. Minn. Dec. 5, 1991). The U.S. Supreme Court summarily vacated the injunction a month later. Cotlow v. Emison, 502 U.S. 1022 (1992) (mem.). After the state court issued its final order on the legislative plan and had held its final hearing before adopting a

congressional plan, the federal court threw out the state court's legislative plan, issued one of its own, and enjoined the secretary of state from implementing any congressional plan other than the one issued by the federal court. Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992). The federal court's order regarding the legislative plan was stayed pending appeal, Growe v. Emison, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers), but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In Growe v. Emison, 507 U.S. 25 (1993), the Court held that the district court had erred in not deferring to the state court. The Court repeated its words from several previous cases that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." 507 U.S. at 34. As the court said:

Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer. 507 U.S. at 35.

Rather than coming to the rescue of the Minnesota electoral process, the federal court had raced to beat the state court to the finish line, even tripping it along the way. 507 U.S. at 37. It would have been appropriate for the federal court to have established a deadline by which, if the state court had not acted, the federal court would proceed. 507 U.S. at 34. However, the Supreme Court found that the state court had been both willing and able to adopt a congressional plan in time for the elections. Id. The Supreme Court reversed the federal court's decision in its entirety, allowing the state court's congressional plan to become effective for the 1994 election.

B. Federal Court May Not Directly Review State Court Decision

Once a state court has completed its work, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give the state court's judgment the same effect as it would have in the State's own courts. Parsons Steel Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986). A federal district court may not simply modify or reverse the state court's judgment. That may be done only by the U.S. Supreme Court on appeal from or writ of certiorari to the state's highest court. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). This principle is now known as the "Rooker-Feldman doctrine." See also, Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970).

C. Plan Approved by State Court Subject to Collateral Attack in Federal Court

Although the state court's judgment on a redistricting plan is not subject to review or direct attack in federal district court, the plan remains subject to collateral attack. That is, it may be attacked in federal court for different reasons or by different parties. See, e.g., Johnson v. DeGrandy, 512 U.S. 997, slip op. at 6-8 (1994); Nerch v. Mitchell, No. 3:CV-92-0095, (M.D. Pa. Aug. 13, 1992) (per curiam).

The judicial doctrines that establish limits on those collateral attacks are called res judicata and collateral estoppel. Res judicata translates literally as "the matter has been decided." It means that a decision by a court of competent jurisdiction on a matter in dispute between two parties is forever binding on those parties and any others who were working with ("in privity with") them. Res judicata applies when the parties are the same, the cause of action is the same, and the factual issues are the same. If the

parties and the issues are the same, but the cause of action is different, the term "collateral estoppel" is used to describe the same concept.

What this means for those who draw redistricting plans is that, if an issue was not raised and decided in state court, it is open for decision in a federal court. It also means that, if parties raise in federal court the same issue raised by different parties in state court, the federal court may come to a different conclusion.

D. Federal Court Must Defer To State Remedies

After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform the plan to federal law. In North Carolina, Cromartie v. Hunt, 34 F. Supp. 1029 (E.D. N.C. 1998), rev'd, Hunt v. Cromartie, 526 U.S. 541 (1999); Georgia, Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd sub nom. Miller v. Johnson, 515 U.S. 900 (1995); and Texas, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996), the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. Only when the Georgia, Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga. 1995) and 922 F. Supp. 1556 (S.D. Ga. 1995), aff'd sub nom. Abrams v. Johnson, 117 S. Ct. 1925 (1997), and Texas, Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997), legislatures had failed to enact a corrected plan did the federal courts in those states impose plans of their own. In contrast, however, the federal district court in Florida imposed a legislative plan of its own within three hours of having struck down the plan enacted by the Legislature and approved by the Florida Supreme Court. The court's order imposing its plan was immediately stayed

by the U.S. Supreme Court, Wetherell v. DeGrandy, 505 U.S. 1232 (1992) (mem.), and eventually reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy. See Johnson v. DeGrandy, 512 U.S. 997 (1994).

If the state's legislative and judicial branches fail to conform a redistricting plan to federal law after having been given a reasonable opportunity to do so, a federal court may impose its own remedy. Even then, however, the federal court must follow discernible state redistricting policy to the fullest extent possible. Upham v. Seamon, 456 U.S. 37 (1982). The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible. Upham v. Seamon, 456 U.S. at 43; White v. Weiser, 412 U.S. 783, 793-97 (1973); Whitcomb v. Chavis, 403 U.S. 124, 160-61 (1971). See also Abrams v. Johnson, 117 S. Ct. 1925 (1997).

E. Attorney General May Represent State in Federal Court

Although the U.S. Supreme Court has been unanimous in holding that a federal court must defer to a state court that is in the process of redistricting, Growe v. Emison, 507 U.S. 25 (1993), in Lawyer v. Department of Justice it split 5-4 on the question of what procedure a federal court should follow when deferring to a state legislature whose redistricting plan has come under attack. 117 S. Ct. 2186 (1997).

Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the ground that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature; the Justice Department had refused to preclear it because it failed to create a majority-minority district in the area; the governor and legislative leaders had refused to call a special session

to revise the plan; the state Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate the Justice Department's objection; and the plan had been used for the 1992 and 1994 elections. A suit had been filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996 the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree.

Justice Stevens, writing for the majority, found that action by the Legislature was not necessary. He found that the State was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation. 117 S. Ct. 2186, slip op. at 8-11.

Justice Scalia, writing for the four dissenters, argued that:

The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.

117 S. Ct. 2186, slip op. at 7.

Now that it is clear that federal courts must defer to redistricting proceedings in a state court, legislatures will want to be prepared to defend their plans in state court. Once the state court proceedings are concluded, and even

while they are in progress, legislatures must be prepared to defend the plans in federal court as well. In both courts, legislatures will want to remain on good terms with their attorney general.

Footnotes

1. **§ 1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973b (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

§ 1973l(c)(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

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District	April 1, 1980	April 1, 1990	April 1, 2000	Percent Change	
				1980 to 1990	1990 to 2000
State	964,691	1,108,229	1,211,537	14.9	9.3
Hawaii County	**92,053**	**120,317**	**148,677**	**30.7**	**23.6**
Puna	11,751	20,781	31,335	76.8	50.8
South Hilo	42,278	44,639	47,386	5.6	6.2
North Hilo	1,679	1,541	1,720	-8.2	11.6
Hamakua	5,128	5,545	6,108	8.1	10.2
North Kohala	3,249	4,291	6,038	32.1	40.7
South Kohala	4,607	9,140	13,131	98.4	43.7
North Kona	13,748	22,284	28,543	62.1	28.1
South Kona	5,914	7,658	8,589	29.5	12.2
Kau	3,699	4,438	5,827	20.0	31.3

Source: U.S. Bureau of the Census, 1990 Census of Population and Housing Unit Counts, Hawaii, 1990 CPH-2-13 (March 1993), table 8; and Census 2000 Redistricting Data, (Pulbic Law 94-171) Summary File; figures compiled and calculated by County of Hawaii, Department of Research & Development.